LIBRARY
PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 19 1969
JOHN F. DAVIS, CLERK

No. 617

IN THE

Supreme Court of the United States

UNITED FUEL GAS COMPANY, a corporation,
Appellant,

v.

CHARLES H. HADEN, II,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

C. E. GOODWIN
H. L. SNYDER
Counsel for Plaintiff-Appellant,
United Fuel Gas Company
P. O. Box 1273
Charleston, West Virginia 25325

September 17, 1969

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

SUBJECT INDEX

	Beginning on Page
Table of Authorities	iii
Jurisdictional Statement	1
(a) The Opinions Below	2
(b) Grounds on Which Jurisdiction Is Invoked	2
(c) Questions Presented by This Appeal	3
(d) Statement of the Case	4
The General Background of United Fuel Gas Company	4
The Mainline Industrial Sale to Du Pont	7
The Mainline Industrial Sale to Elk Refining	8
The Mainline Industrial Sale to Kaiser	9
The Stages and Manner in Which the Federal Questions Were Raised, and the Way in Which They Were Passed Upon	12
(e) The Federal Questions Are Substantial	16
(i) The case is within the jurisdictional provisions relied upon and the cases cited to sustain the jurisdiction.	16
(ii) The Majority Opinion rejects the primacy of this Court in defining the terms used in the federal Constitution.	19
(iii) The judgment below conflicts in its result with decisions of this Court and other federal and State courts.	22
(iv) The Majority Opinion foreshadows a fundamental enlargement in the State tax burden of basic industry in interstate commerce, over and beyond the constitutional limits established in prior decisions of this Court.	24

	Beginning on Page
Appendix A—Opinions and Judgment Below	1a
Part One: The Opinion by Haymond, Judge	1a
Part Two: The Opinion by Calhoun, Judge	66a
Part Three: The Judgment, Entered April 3, 1969	78a
Part Four: The Order Refusing United Fuel's Petition for Rehearing, Entered June 24, 1969	80a
Part Five: The Opinion of the Circuit Court of Kanawha County, West Virginia	81a
Appendix B—Statutes Involved	137a
Introductory Note	137a
Part One: Statutes Involved from January 1, 1957, through June 30, 1958	138a
Part Two: Statutes Involved from July 1, 1958, through June 30, 1959	146a
Part Three: Statutes Involved from July 1, 1959, through December 31, 1961	148a
Part Four: Statutes Involved in the Procedure of Assessments and Appeals	154a

TABLE OF AUTHORITIES

Cited on Pages—

Judicial Decisions

Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959) 3, 18

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 3, 18-19

Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) 21

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 21

Chicago Great Western R. R. v. Basham, 249 U.S. 164 (1919) 3, 17

Cole v. Arkansas, 333 U.S. 196 (1948) 3, 18

Cole v. Violette, 319 U.S. 581 (1943) 3, 17

East Ohio Gas Co. v. Tax Commission, 283 U.S. 465 (1931) 22

Freeman v. Hewit, 329 U.S. 249 (1946) 26

Gay v. United Gas Pipe Line Co., 159 Fla. 659, 32 So.2d 600 (1947) 21, 23

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 21

Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) 22-23, 24

Ideal Cement Co. v. United Gas Pipe Line Co., 282 F.2d 574 (5th Cir. 1960), *vacated on procedural grounds*, 369 U.S. 134 (1962) 23

Market Street Ry. v. Railroad Commission, 324 U.S. 548 (1945) 3, 17

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) 23

Mississippi River Fuel Corp. v. Hoffman, 4 Ill.2d 468, 123 N.E.2d 503, *cert. denied sub nom. Wright v. Mississippi River Fuel Corp.*, 349 U.S. 935 (1955) 21, 23

Cited on Pages

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930) 3, 19

Mower v. Fletcher, 114 U.S. 127 (1885) 3, 17

Natural Gas Pipeline Co. v. Illinois Commerce Commission, 33 Ill.2d 214, 210 N.E.2d 490 (1965) 21

Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951) 21

Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U.S. 507 (1947) 21

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 3, 17

Rio Grande Western Ry. v. Stringham, 239 U.S. 44 (1915) 3, 17

Saunders v. Shaw, 244 U.S. 317 (1917) 3, 19

State ex rel. Cities Service Gas Co. v. Public Service Commission, 337 Mo. 809, 85 S.W.2d 890 (1935), *cert. denied*, 296 U.S. 657 (1936) 21

State Tax Commission v. Interstate Natural Gas Co., 284 U.S. 41 (1931) 23

Staub v. City of Baxley, 355 U.S. 313 (1958) 3, 18

Texas Gas Transmission Corp. v. Public Service Commission, 241 Miss. 826, 133 So.2d 526 (1961) 22

United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921) 22

United Gas Pipe Line Co. v. Lee, 154 Fla. 235, 17 So.2d 553 (1944) 21, 23

United Gas Pipe Line Co. v. Mississippi Public Service Commission, 241 Miss. 762, 133 So.2d 521 (1961) 21-22

United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) 20-21

Cited on Pages—

Constitutions and Statutes

U. S. CONST., art. I, § 8 (Commerce Clause) 2, 4, 12, 14, 15, 17, 18, 20, 23, 24

Natural Gas Act, 15 U.S.C.A. §§ 717-717w 4, 5, 6, 9, 19

28 U.S.C. § 1257 3, 17, 18

W. VA. CODE—
- c. 11, art. 12A 24
- c. 11, art. 13, § 1 25
- c. 11, art. 13, § 2 2, 4, 24, 25
- c. 11, art. 13, § 2-b 25
- c. 11, art. 13, § 2-c 26
- c. 11, art. 13, § 2-d 2, 4, 19, 20, 24, 25
- c. 11, art. 13, § 8 3, 14, 16
- c. 11, art. 15 24
- c. 11, art. 15A 24
- c. 11, art. 24 24

Miscellaneous Authorities

FEDERAL POWER COMMISSION, FORTY-FIFTH ANNUAL REPORT 115 (1966) 27

FEDERAL POWER COMMISSION, 1968 ANNUAL REPORT 46 (1969) 26

JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1778) 21

3 A NEW ENGLISH DICTIONARY 677-78 (Oxford ed. 1888) 21

Rule XI, Rules of Practice in the Supreme Court of Appeals of the State of West Virginia 14

SPECIAL SUBCOMMITTEE, HOUSE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H. R. Rep. No. 565, 89th Cong., 1st Sess. 1005-1114 (1965) 24-25, 26

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 456 (1961) 21

No. _____

IN THE

Supreme Court of the United States

UNITED FUEL GAS COMPANY, a corporation,
Appellant,

v.

CHARLES H. HADEN, II,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellant, hereinafter referred to as United Fuel, appeals from the judgment of the Supreme Court of Appeals of the State of West Virginia entered April 3, 1969, which said judgment subsequently became final when the Supreme Court of Appeals of West Virginia refused United Fuel's petition for rehearing by order entered June 24, 1969. Said final judgment reversed the judgment of the Circuit Court of Kanawha County, West Virginia, insofar as the same was pertinent to this appeal.

This appeal is limited to that part of said final judgment of the Supreme Court of Appeals of the State of West Virginia that holds that United Fuel's mainline industrial sales of natural gas to E. I. du Pont de Nemours and Company, Elk Refining Company, and Kaiser Aluminum and Chemical Corporation, are not

interstate commerce. United Fuel submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

(a) THE OPINIONS BELOW

The opinions of the Supreme Court of Appeals of the State of West Virginia are not yet officially reported. The opinion by Haymond, Judge, which is the dissenting opinion on the questions raised in this appeal (but the majority opinion on all other questions), is unofficially reported in 167 S.E.2d 890-920. The opinion by Calhoun, Judge, which is the majority opinion on the questions raised by this appeal, is unofficially reported in 167 S.E.2d 920-25. Attached hereto in Appendix A are (1) the opinion by Haymond, Judge, at pages 1a-65a; (2) the opinion by Calhoun, Judge, at pages 66a-77a; (3) the judgment, entered April 3, 1969, at pages 78a-79a; and (4) the order refusing United Fuel's petition for rehearing, entered June 24, 1969, at page 80a.

The opinion of the Circuit Court of Kanawha County, West Virginia, is not to be reported. It is attached hereto as Part Five of Appendix A, at pages 81a-136a.

(b) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) This appeal is to set aside a judgment for gross receipts privilege taxes assessed under the provisions of W. VA. CODE, c. 11, art. 13, §§ 2 and 2-d, as amended from time to time (see paragraph (v), *infra*, p. 3), on the ground that such assessment is invalid under the Commerce Clause of Article I, Section 8 of the Constitution of the United States. The proceeding was originally brought by United Fuel under the provisions of

W. VA. CODE, c. 11, art. 13, § 8, as amended by W. VA. ACTS 1963, c. 182.

(ii) The judgment sought to be reviewed was dated and entered April 3, 1969. The order refusing United Fuel's petition for rehearing was entered June 24, 1969. United Fuel's Notice of Appeal was filed September 8, 1969, in the Circuit Court of Kanawha County, West Virginia.

(iii) 28 U.S.C. § 1257(2) is the statute which confers jurisdiction on this Court to hear the appeal.

(iv) The cases which sustain the Court's jurisdiction are *Allied Stores, Inc. v. Bowers,* 358 U.S. 522 (1959); *Staub v. City of Baxley,* 355 U.S. 313 (1958); *Cole v. Arkansas,* 333 U.S. 196 (1948); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Market Street Ry. v. Railroad Commission,* 324 U.S. 548 (1945); *Cole v. Violette,* 319 U.S. 581 (1943); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner,* 281 U.S. 313 (1930); *Chicago Great Western R. R. v. Basham,* 249 U.S. 164 (1919); *Saunders v. Shaw,* 244 U.S. 317 (1917); *Rio Grande Western Ry. v. Stringham,* 239 U.S. 44 (1915); and *Mower v. Fletcher,* 114 U.S. 127 (1885).

(v) W. VA. CODE, c. 11, art. 13, §§ 1, 2, 2-d, 3-a, 3-b, 7, 7-b, and 8, as amended and effective for the purposes of this proceeding, are set forth in Appendix B.

(c) QUESTIONS PRESENTED BY THIS APPEAL

1. Did the Supreme Court of Appeals of the State of West Virginia err in holding that United Fuel's main-line industrial sales of Southwest and Kentucky gas to E. I. du Pont de Nemours and Company, Elk Refining Company, and Kaiser Aluminum and Chemical Corporation, pursuant to certificates of convenience and neces-

sity issued by the Federal Power Commission under Section 7(c) of the Natural Gas Act (15 U.S.C.A. § 717f(c)), are not transactions in interstate commerce?

2. Does the Commerce Clause of U. S. CONST., art. I, § 8 forbid the State of West Virginia to tax United Fuel's mainline industrial sales of Southwest and Kentucky gas by imposition of a privilege tax measured by the seller's gross receipts from such sales?

(d) STATEMENT OF THE CASE

This case involves the Business and Occupation Tax of West Virginia, which is a privilege tax (W. VA. CODE, c. 11, art. 13, § 2). Applied to the facts at bar, it is a tax on the privilege of doing business as a public utility, measured by the gross income from the "supplying of public services" without deductions on account of any expenses except a small tax credit (W. VA. CODE, c. 11, art. 13, § 2-d).

The General Background of United Fuel Gas Company

United Fuel is a West Virginia corporation, authorized to do business in West Virginia, Kentucky, Louisiana, Ohio, and Virginia (R. 87-89),* and principally engaged in the production, purchase, transmission, distribution,

* This case was submitted to the trial court on stipulation. A narrative stipulation accounts for the bulk of the record that was printed for proceedings below, which printed material has been filed (in lieu of the many separate documents in typescript) on this appeal, by agreement of counsel. Citations to this narrative stipulation and other material printed below are to the printed record ("R") page.

The stipulated exhibits were never printed. Instead, they were photocopied or otherwise duplicated in eight volumes. Citations to Stipulation Exhibits 1 through 131 are by reference to "X" for "Exhibit", plus the identifying number. Citations to Stipulation Map Exhibits 132 through 159 are by reference to "MX" for "Map Exhibit", plus the identifying number.

Copies of record documents that became of record *after* submission of the case to the Supreme Court of Appeals of West Virginia are cited by reference to the "typescript record" ("T. R."), as paginated by the Clerk of the Circuit Court of Kanawha County, West Virginia, in preparing the record for this appeal.

and sale of natural gas at both wholesale and retail, in West Virginia and other States (R. 89).

United Fuel is a public service corporation. It is a "natural-gas company" under the Natural Gas Act (15 U.S.C.A. §§ 717-717w), subject to regulation by the Federal Power Commission, and a public utility under West Virginia law, subject to regulation by the Public Service Commission of West Virginia (R. 89).

The essentially interstate character of the natural gas industry is typified by United Fuel's operation.

The origin and destination of United Fuel's gas supply is depicted on Map Exhibit 133, a map published by the Federal Power Commission. It shows the path of the interstate pipelines bringing gas from Louisiana and Texas across Arkansas, Mississippi, Alabama, Tennessee, and Kentucky into West Virginia.

Ninety percent of United Fuel's sales of gas in West Virginia, both interstate and intrastate, follows these interstate routes in continuous streams from the Southwest (X 11)—some of it bought from Tennessee Gas Transmission Company ("Tennessee Gas") at several points in West Virginia, and the balance received from Columbia Gulf Transmission Company ("Columbia Gulf") in Boyd County, Kentucky (R. 95; MX 132). Three percent of United Fuel's sales in West Virginia is of gas produced from Kentucky and Virginia gas wells and imported into West Virginia, and the seven percent balance is produced in West Virginia (X 11).*

* These proportions of United Fuel's sales in West Virginia (90% Southwest, 3% Kentucky and Virginia, and 7% West Virginia) are more heavily Southwest than the entire gas supply entering United Fuel's system in the three States of Kentucky, Virginia, and West Virginia (compare X 2 with X 11). This is due to the fact that most of the West Virginia and Kentucky gas is *not* sold in West Virginia, but instead in Kentucky and Ohio (see MX 134 and 135).

The same Map Exhibit 133 shows how the gas so acquired by United Fuel flows on through the company's system for ultimate consumption in Kentucky, West Virginia, Ohio, Virginia, Maryland, Pennsylvania, New York, and the District of Columbia. In fact, barely 10% of the gas which United Fuel sells in West Virginia is later consumed in this State (R. 89-90; X 37; MX 138 through 152).

This description of the interstate movement of the gas typifies the entire period of 1957 through 1961 covered by the audit leading up to the Tax Commissioner's formal Reassessment (R. 93-94). It is also very similar to United Fuel's operations ever since 1944 (R. 142-43), when Southwest gas first became a part of the company's gas supply (R. 95).

All contracts between United Fuel and its interstate suppliers are fully regulated by the Federal Power Commission (R. 94-95; X 5 and 8). In the main, these contracts are long-term, to assure continuity of supply to the general public (R. 94). The Federal Power Commission has also issued formal certificates of public convenience and necessity authorizing the operation of all transmission pipelines and compressor stations and all underground storage fields, pipelines, and storage compressor stations owned by United Fuel and its major wholesale suppliers (Tennessee Gas and Columbia Gulf), "as well as the construction of such facilities as were built after the enactment of the Natural Gas Act in 1938." (R. 98.)

This appeal involves three "mainline" industrial sales, i.e., sales made direct from United Fuel's interstate transmission system and authorized pursuant to the provisions of Section 7(c) of the Natural Gas Act. The

mainline customers are E. I. du Pont de Nemours and Company ("Du Pont"), Elk Refining Company ("Elk Refining"), and Kaiser Aluminum and Chemical Corporation ("Kaiser"). The aggregate of the taxes sought to be imposed on United Fuel by reason of these three sales, for the "assessment period" of 1957 through 1961, amounts to $794,181.12 (MX 154, 156. and 157). The circumstances of each sale are of record.

The Mainline Industrial Sale to Du Pont

United Fuel and Du Pont entered into a Precedent Agreement (X 54) in March, 1956; the final Agreement (X 39), with a 20-year term, was dated November 7, 1956, and provided for the sale and delivery of gas to Du Pont's Belle Plant in Kanawha County, West Virginia. This plant has facilities for shipping by river and rail, and by tank trailers over the highways (R. 155).

Using natural gas as a basic raw material, the Belle Plant now manufactures 30 major products and a number of minor products (R. 155). The gas delivered by United Fuel is taken into the Belle Plant at the main transmission line pressure of 550 pounds per square inch, the pressure required by the Du Pont processes (R. 156-57).

Approximately 88% of the products of the Belle Plant is immediately shipped out of West Virginia for further processing; about 7% is shipped to Du Pont's Parkersburg (West Virginia) Plant for further processing before being shipped out of West Virginia; and the remaining 5% is sold to other chemical companies for use in their products. (R. 155.)

Before United Fuel could commence performance of its contract with Du Pont, Federal Power Commission

authorization was obtained by order issued September 18, 1956, in FPC Docket No. G-10658 (X 56).

Even before this, United Fuel had made long-term contract arrangements with Tennessee Gas, and Tennessee Gas had in turn consummated a similar gas acquisition program with its Southwest lessors and independent producers, based in part on United Fuel's contract obligation to furnish Du Pont's substantially constant gas requirements (R. 157).

The normal flow of gas sold to Du Pont, and other relevant details, are shown on Map Exhibit 154, which shows both the summer and winter periods.

The origin of all gas deliveries to Du Pont was 100% Southwest gas, purchased by United Fuel from Tennessee Gas in Kanawha County, and then transported southerly by United Fuel to the Kanawha County point of delivery to Du Pont (R. 157).

In the summer periods, the gas flowed continuously from the various producing wells in Louisiana and Texas to Du Pont at the mainline tap near the end of Transmission Line SM-88 in Belle (R. 158).

The gas to be sold to Du Pont in the winter months was stored for the summer from the same Louisiana and Texas supply in United Fuel's Storage Field X-52, about five miles northeast of Belle. In the winter periods, the gas was withdrawn from Storage Field X-52 as Du Pont required it. (R. 158.)

The Mainline Industrial Sale to Elk Refining

United Fuel's mainline sales of gas to Elk Refining go back more than 40 years under a series of industrial contracts. The current contract is Exhibit 42. (R. 158.)

All of the gas delivered to Elk Refining is used in its Falling Rock Refinery in Kanawha County, West Virginia, where it is commingled with gas from other sources, and used to fire steam boilers for the entire energy needs of the Refinery (R. 158-59).

The Falling Rock Refinery manufactures various fuel oils, gasolines, lubricating stocks, commercial waxes, and related products. (R. 159.) It accepts gas from United Fuel at the prevailing transmission line pressure (X 42).

The mainline industrial sale to Elk Refining preceded the enactment of the Natural Gas Act in 1938, and so the Federal Power Commission has never specifically issued a certificate. However, Section 7(c) of the Natural Gas Act provided for a "grandfather certificate" for all pre-existing jurisdictional facilities, which United Fuel obtained. (R. 159.)

The normal flow of gas sold to Elk Refining, and other relevant details, are shown on Map Exhibits 155 (summer period) and 156 (winter period). The summer period deliveries were West Virginia gas (MX 155). The winter period deliveries, however, are estimated to have been only 8% West Virginia pipeline gas, with 92% being storage gas from United Fuel's underground storage fields (MX 156). The storage gas was (MX 136) virtually all Southwest gas. (R. 159-60.)

The Mainline Industrial Sale to Kaiser

The Kaiser plant is located near the City of Ravenswood in Jackson County, West Virginia (MX 157). It is an integrated aluminum manufacturing plant, integrating two different types of plants at a single site. A reduction plant reduces or converts raw alumina, a bauxite ore derivative which is shipped to the Jackson

County plant, to pure aluminum by an electrolytic process. Then a fabrication plant fabricates molten aluminum into the desired solid shapes and forms, for sale as bulk metal or fabricated aluminum products of a wide variety. (R. 160.) United Fuel supplies the gas direct from its transmission pipeline at the pressures required by Kaiser (X 49).

Kaiser's major uses of the gas are for a series of industrial furnaces, other direct heat applications, and the firing of steam boilers, for various steps in the manufacturing processes (R. 160-61).

Before United Fuel could commence performance of its contract with Kaiser (X 57), Federal Power Commission authorization was required. By order issued October 13, 1955, in FPC Docket No. G-9070 (X 58), the Federal Power Commission issued a certificate of public convenience and necessity that authorized United Fuel to "construct and operate approximately six (6) miles of 10-3/4 inch natural gas transmission pipeline, designated as Line EM-63 * * *, together with appurtenant equipment", "for the purpose of transporting and selling natural gas primarily and directly to the Kaiser Aluminum and Chemical Corporation for industrial consumption in its aluminum fabricating plant now under construction" in Jackson County. The certificate was issued upon the express condition that deliveries of natural gas by United Fuel to Kaiser could not exceed 5500 Mcf per day. (R. 161.)

Kaiser and United Fuel negotiated a new contract dated October 1, 1957 (X 49), calling for deliveries of as much as 13,000 Mcf of gas per day. United Fuel obtained authorization for the sale of the increased quantity from the Federal Power Commission, by order

issued September 16, 1957, in FPC Docket No. G-9070 (X61).

Both initially and for the 1957 increase, United Fuel's long-term arrangements for Southwest gas were based in part on its contractual obligation to meet Kaiser's substantially constant gas requirements (R. 161-62).

The normal flow of gas sold to Kaiser, and other relevant details, are shown on Map Exhibit 157, which shows both the summer and winter periods.

The origin of all gas sold to Kaiser from 1959 through 1961 is estimated to have been 95% Southwest gas, 3%+ Kentucky gas, and 2%— West Virginia gas. This Southwest gas and Appalachian gas was brought together in separate continuous streams at United Fuel's Ceredo Compressor Station in Wayne County, West Virginia, where it was commingled, compressed, and then transported without interruption toward the point of delivery. (R. 162.)

In the summer periods, the gas sold to Kaiser flowed continuously from the various producing Southwest and Appalachian wells through the Columbia Gulf, Tennessee Gas, and United Fuel systems directly to the point of delivery to Kaiser at the mainline tap near the end of United Fuel's Transmission Line EM-63, about five miles southwest of Ravenswood. (R. 162.)

In the winter periods, the gas sold to Kaiser was withdrawn from Storage Field X-58, about ten miles northeast of Ravenswood, where it had been temporarily stored during the preceding summer months. (R. 162.)

In the years 1957 and 1958 (the first years of the Reassessment period), 100% of the gas delivered to Kaiser was Southwest gas (MX 157; R. 163).

The Stages and Manner in Which the Federal Questions Were Raised, and the Way in Which They Were Passed Upon

The case was submitted on stipulated materials. These consisted of a narrative stipulation (R. 76-203) and eight volumes of exhibits (X 1-131, and MX 132-159). The Commerce Clause questions now sought to be reviewed grew out of "Agreed Issue No. 10", reading as follows:

> "Does Tax Section 2d [that is, W. VA. CODE, c. 11, art. 13, § 2-d], in providing inter esse that 'The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States.', thereby exclude from taxation under any Tax Section of the statute United Fuel's gross income from sales of gas under special industrial contracts directly from United Fuel's transmission pipelines to—
>
> (a) E. I. du Pont de Nemours and Company,
>
> (b) Elk Refining Company, and
>
> (c) Kaiser Aluminum & Chemical Corporation
>
> —in view of the particular facts, including the role of underground storage, involved in the sales and deliveries to each?" (R. 85.)

The opinion of the Circuit Court shows how the parties handled this issue:

> "The primary contention of the plaintiff [United Fuel] is that the exclusionary provision of the statute does not merely limit the application of the tax of Section 2d to sales which could be taxed without impinging upon the Commerce Clause of the Constitution, but that all sales in interstate commerce are thereby excluded. * * *

> "* * * However, judging from the [Tax Commissioner] defendant's 'pre-trial' brief, it was apparently not anticipated that the plaintiff's primary reliance would be that all sales in interstate commerce are thereby expressly excluded, and not merely those sales involving interstate commerce, the taxation of which would unduly burden interstate commerce. In other words, most of the authorities cited by counsel for the defendant [Tax Commissioner] stand for the proposition that a state may regulate or tax comparable sales, even though they involve interstate commerce". (Appendix A, Part Five, pp. 123a-124a; R. 251.)

After discussion of these positions, the Circuit Court first held that the three mainline industrial sales of Southwest and Kentucky gas were interstate commerce (Appendix A, Part Five, p. 125a; R. 252). Then the Circuit Court basically adopted United Fuel's primary position, and ruled in United Fuel's favor on the issue of taxability:

> "In light of the decision in Battle v. Baltimore & Ohio R. R. Co., [149 W.Va. 810, 143 S.E.2d 331 (1965), cert. denied, 384 U.S. 970 (1966),] supra, indicating, in my view, a broader application of the Commerce Clause, and of the decisions from other states, construing similar excluder clauses, and upon the clear mandate of the excluder of Section 2d, I am of opinion that the statute must be literally applied to exclude from the computation of the taxes, not only sales in interstate commerce which would, if taxed, clearly constitute an unreasonable burden thereon under the Constitution, but all gross income from any transaction in interstate commerce. * * * [Citations omitted.] Accordingly, having heretofore found that the transmission pipeline-sales involved in Agreed Issue No. 10 are sales involving inter-

state commerce, I am of opinion that Agreed Issue No. 10 should be answered in the affirmative." (Appendix A, Part Five, pp. 127a-128a; R. 254-55.)

The Tax Commissioner appealed the Circuit Court decision to the Supreme Court of Appeals of West Virginia under the provisions of W. VA. CODE, c. 11, art. 13, § 8.* In his Petition for Appeal, the Tax Commissioner urged that the Circuit Court had erroneously ignored Commerce Clause principles in ruling on Agreed Issue No. 10 (R. 8, 10).

On the constitutional question, the majority of the Supreme Court of Appeals of West Virginia joined in the Opinion by Calhoun, Judge (Appendix A, Part Two, pp. 66a-77a; 167 S.E.2d 920-25). This opinion, hereinafter styled "the Majority Opinion", attempted to dodge the Commerce Clause question raised and decided in the trial court, and appealed by the Tax Commissioner, by asserting that the federal question had not been presented—and then proceeded to hold that United Fuel's mainline sales were not commerce at all.

These are the steps in the reasoning of the Majority Opinion:

(1) *The Majority Opinion incorrectly stated that United Fuel had argued that the Commerce Clause question was not before the court* (Appendix A, Part Two, p. 67a; 167 S.E.2d at 920-21)—a grave misstatement of United Fuel's argument (Brief for the Plaintiff, March 25, 1968, pp. 154-55).

(2) *The Majority Opinion erroneously ruled that the parties were not entitled to address the question*

* United Fuel cross-appealed on other issues not here relevant, by specification in its brief under the procedure permitted under Rule XI of the Rules of Practice in the Supreme Court of Appeals.

of constitutionality, despite the trial court's recognition and disposition thereof. (Appendix A, Part Two, pp. 67a-68a; 167 S.E.2d at 921.)

(3) *The Majority Opinion stated that if the Commerce Clause issue were to be decided, the utility privilege tax might not constitutionally apply to the three mainline industrial sales.* ("I am of the opinion, as apparently was the trial court, that if it were held that the tax here in question represents a tax upon gross income derived from interstate commerce under the statute, it might with some reason be argued that, under the Baltimore and Ohio Railroad Company case, the tax is, as a matter of course, violative of the Commerce Clause." Appendix A, Part Two, p. 68a; 167 S.E.2d at 921.)

(4) *The Majority Opinion held that the statutory excluder of "gross income derived from commerce between this state and other states" is simply declarative of the Commerce Clause.* ("* * * merely represents, in my opinion, a legislative purpose to recognize fully the inhibition imposed upon the states by the Commerce Clause of the Constitution of the United States." Appendix A, Part Two, p. 72a; 167 S.E.2d at 923.)

(5) *Finally, and remarkably, the Majority Opinion held that the mainline industrial sales to Du Pont, Elk Refining, and Kaiser are not commerce at all, and thus can not be interstate commerce.* ("In my judgment, United Fuel as a natural gas company engaged in business in this state as a public utility, does not earn a single dime as 'gross income derived from commerce', either interstate or intrastate, in the sales of gas to these three industrial

consumers. It is not engaged in any business by which it earns or undertakes to earn a gross income from engaging in commerce as such. * * * Its gross earnings here in question are not derived from commerce." Appendix A, Part Two, pp. 73a-74a; 167 S.E.2d at 923.)

United Fuel's Petition for Rehearing, filed with the Supreme Court of Appeals of West Virginia on May 2, 1969, presented *inter alia* the same federal questions addressed in this Jurisdictional Statement, though in a slightly different form (T. R. 1675-76).

No written opinion accompanied the order denying (Appendix A, Part Four, p. 80a; T. R. 1704) United Fuel's Petition for Rehearing (T. R. 1673-77), notwithstanding the decisions of this Court that the mainline industrial sale of imported gas constitutes interstate commerce.

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Three reasons of substance underlie this appeal. *First*, the Majority Opinion rejects the primacy of this Court in defining the terms used in the federal Constitution. *Second*, the judgment below conflicts in its result with decisions of this Court and other federal and State courts. *Third*, the Majority Opinion foreshadows a fundamental enlargement in the State tax burden of basic industry in interstate commerce, over and beyond the constitutional limits established in prior decisions of this Court.

(i) The case is within the jurisdictional provisions relied upon and the cases cited to sustain the jurisdiction.

The appellate procedure set out in W. VA. CODE, c. 11, art. 13, § 8, establishes that the Supreme Court of Appeals of West Virginia is "the highest court" in West

Virginia "in which a decision could be had", within the meaning of 28 U.S.C. § 1257.

The judgment order (Appendix A, Part Three, pp. 78a-79a) became final on June 24, 1969, when the court refused United Fuel's Petition for Rehearing by order entered on that date (Appendix A, Part Four, p. 80a). *Market Street Ry. v. Railroad Commission*, 324 U.S. 548 (1945); *Chicago Great Western R. R. v. Basham*, 249 U.S. 164 (1919). Even though the judgment order remanded the case to the Circuit Court of Kanawha County, the explicit directions accompanying the remand preserve the finality of the appellate rulings: an appellate judgment is final where the order of remand leaves "nothing to be done but the ministerial act of entering judgment in the trial court." *Cole v. Violette*, 319 U.S. 581, 582 (1943); *Rio Grande Western Ry. v. Stringham*, 239 U.S. 44 (1915); *Mower v. Fletcher*, 114 U.S. 127 (1885).*

Despite the fact that the parties argued and the trial court dealt with the Commerce Clause questions under Agreed Issue No. 10 (*supra*, pp. 12-14), and despite the Tax Commissioner's presentation of the Commerce Clause questions in his Petition for Appeal to the Supreme Court of Appeals (*supra*, p. 14), the Majority Opinion ruled that no constitutional question was before it (*supra*, pp. 14-15, item 2), though it indicated the doubtful constitutionality of the tax on these mainline industrial sales (*supra*, p. 15, item 3).

Nonetheless, two lines of authority sustain this Court's

---

* Even if the directions had been altogether omitted from the order of remand, the judgment would still be final, because "the facts have been stipulated" and the appellate court "passed on the issues which control the litigation", so that "there is nothing more to be decided." *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 73-74 (1946).

jurisdiction of United Fuel's appeal under 28 U.S.C. § 1257(2).

First, the fact of the matter controls. The presentation of federal questions, in short, is itself a federal issue which "this Court must determine for itself". *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 524 (1959). Even when some question of local practice may exist, the Court has rejected technical procedural objections to reach constitutional questions that have in fact been raised. *E.g., Staub v. City of Baxley*, 355 U.S. 313 (1958). Indeed, once an issue has been addressed by the parties and ruled upon by the trial court, an appellate decision which ignores the issue on appeal may amount to a denial of due process. *Cole v. Arkansas*, 333 U.S. 196 (1948).

Second, neither party could have foreseen that the Supreme Court of Appeals of West Virginia would attempt to dodge the Commerce Clause questions at the same time it said the statutory excluder was a declaration of constitutional law (*supra*, p. 15, item 4). The incongruity of such reasoning is heightened by the history of the trial court's ruling on the Commerce Clause questions (*supra*, pp. 12-14) and the Tax Commissioner's appeal therefrom (*supra*, p. 14). Under these circumstances, United Fuel is entitled to rely on its Petition for Rehearing (T. R. 1673-77) to the Supreme Court of Appeals. Where the state appellate court renders a decision that could not have been expected, and that unexpected holding itself raises a federal question, the surprised party has the right to raise the federal question on a petition for rehearing—because only then has the surprised party the opportunity to present the federal question. This rule sustained the Court's jurisdiction in such cases as *Cole v. Arkansas, supra; Brinker-*

hoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930); and *Saunders v. Shaw*, 244 U.S. 317 (1917).

(ii) The Majority Opinion rejects the primacy of this Court in defining the terms used in the federal Constitution.

Pursuant to certificates of convenience and necessity issued by the Federal Power Commission under Section 7(c) of the Natural Gas Act (15 U.S.C.A. § 717f(c)), United Fuel has made mainline industrial sales of Southwest and Kentucky gas, direct from its interstate transmission system, to Du Pont, Elk Refining, and Kaiser.

The Majority Opinion holds that these transactions are not interstate commerce. It holds they are not commerce at all. (Appendix A, Part 2, p. 73a; 167 S.E.2d at 923.) This holding was technically limited to defining the phrase in W. VA. CODE, c. 11, art. 13, § 2-d, excluding from the utility privilege tax "Gross income derived from commerce between this state and other states of the United States". Therefore, the Majority Opinion asserted, constitutional definitions by the United States Supreme Court "are not directly in point, but are at most persuasive"—even though it went on to declare that the statutory excluder "merely represents, in my opinion, a legislative purpose to recognize fully the inhibition imposed upon the states by the Commerce Clause of the Constitution of the United States." (Appendix A, Part Two, pp. 69a, 72a; 167 S.E.2d at 922, 923.)

This amounts to a doctrine of judicial interposition by a State court. The "reasoning" applied in the Majority Opinion could be applied by any State court in

any case as a means of avoiding the inhibitions imposed upon the States by the Commerce Clause. That clause will become meaningless if a State is permitted to tax the gross receipts of interstate commerce through the simple device of declaring that it is not commerce at all.

As with the Commerce Clause, so with the rest of the Constitution. If the courts in 50 States can insulate local statutes and ordinances by parochial definitions of constitutional terms, the same type of insulation can be enacted by 50 State legislatures. The ramifications of separatism among the States are endless, and they are inimical to the federal system.

Commerce among the states, or commerce between the states, or interstate commerce, are peculiarly federal terms. They have *no* significance and *no* import except as rooted in U. S. CONST., art. I, § 8. Consequently, the use of such phrases by a State legislature in a statute like W. VA. CODE, c. 11, art. 13, § 2-d compels the conclusion that the legislature was using the words in the same sense as they are used in the federal Constitution—because this is the only sense there is for such words.

The "no commerce" holding of the Majority Opinion is palpable error. Whether "commerce" is defined in the ordinary business sense or in the sense of the federal Constitution, a sale of gas or any other commodity is commerce. "Whatever other meanings 'commerce' may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons *bought and sold*, bargained and contracted. And this meaning has persisted to modern times." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 539 (1944) (empha-

sis supplied). For historic definitions of "commerce" in both constitutional and business usage, *compare Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936), *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446-47 (1827), *and Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 229-30 (1824), *with* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 456 (1961), 3 A NEW ENGLISH DICTIONARY 677-78 (Oxford ed. 1888), *and* JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1778)—all of which hold that sales are commerce.

As surely as they are commerce, the mainline industrial sales of Southwest and Kentucky gas are interstate commerce. This Court has twice held so on comparable mainline industrial sales, in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333 (1951), and *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 513 (1947).

Even before these decisions, the courts of Florida and Missouri had come to the same conclusion. *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So.2d 600 (1947); *United Gas Pipe Line Co. v. Lee*, 154 Fla. 235, 17 So.2d 553 (1944); *State ex rel. Cities Service Gas Co. v. Public Service Commission*, 337 Mo. 809, 85 S.W.2d 890 (1935), *cert. denied*, 296 U.S. 657 (1936).

After the Court's *Panhandle Eastern* holdings, the courts of Illinois and Mississippi followed as a matter of course. *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill.2d 468, 123 N.E.2d 503, *cert. denied sub nom. Wright v. Mississippi River Fuel Corp.*, 349 U.S. 935 (1955); *Natural Gas Pipeline Co. v. Illinois Commerce Commission*, 33 Ill.2d 214, 210 N.E.2d 490 (1965); *United Gas Pipe Line Co. v. Mississippi Public Service Com-*

mission, 241 Miss. 762, 133 So.2d 521 (1961); *Texas Gas Transmission Corp. v. Public Service Commission*, 241 Miss. 826, 133 So.2d 526 (1961).

The Majority Opinion rejected these authorities, and rejected this Court's primacy in defining constitutional terms. It should be reversed.

(iii) The judgment below conflicts in its result with decisions of this Court and other federal and State courts.

Though it sought to avoid the constitutional question as such, the Majority Opinion sustained in its effect a gross receipts tax on mainline industrial sales of gas, produced in other States and imported into West Virginia for sale direct from the interstate transmission pipelines.

This result is in direct conflict with the holdings of other courts, all of which proceed from the basic premise of *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931). In this case, the Court distinguished between the interstate commerce of the high-pressure transmission pipeline systems, and the essentially intrastate character of the low-pressure distribution systems from which nearly all utility customers receive gas. The Court held that Ohio might apply a gross receipts tax to all of the utility's sales from the low-pressure distribution system, whether the gas came from Ohio or not (283 U.S. at 472). Just as importantly, however, the Court indicated that a tax on gross receipts from operation of the interstate transmission system would *not* be constitutional (283 U.S. at 470)—a point entirely consistent with the earlier tax cases of *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921) and *Hope Natural Gas Co.*

v. Hall, 274 U.S. 284 (1927), and the later tax cases of *State Tax Commission v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931) and *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

Both Florida and Illinois have considered gross receipts taxes in relation to mainline industrial sales of imported gas. Both have ruled that such sales of imported gas, direct from the interstate transmission system to the industrial purchaser, are protected by the Commerce Clause from such a tax. *United Gas Pipe Line Co. v. Lee*, 154 Fla. 235, 17 So.2d 553 (1944); *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So.2d 600 (1947); *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N.E.2d 503, *cert. denied sub nom. Wright v. Mississippi River Fuel Corp.*, 349 U.S. 935 (1955).

The conflict between the result of the Majority Opinion and the Florida and Illinois holdings cannot be gainsaid, and should be resolved.

In *Ideal Cement Co. v. United Gas Pipe Line Co.*, 282 F.2d 574 (5th Cir. 1960), *vacated on procedural grounds*, 369 U.S. 134 (1962), the Fifth Court of Appeals appears to have gone even further in extending Commerce Clause protection to sales of imported gas for industrial purposes. Certainly its result conflicts with that of the case at bar.

The national disadvantages of judicial conflicts need not be elaborated. Throughout its history, the Court has taken the lead in explicating the harm done by such conflicts to the nationhood of one people in a federal system.

(iv) The Majority Opinion foreshadows a fundamental enlargement in the State tax burden of basic industry in interstate commerce, over and beyond the constitutional limits established in prior decisions of this Court.

West Virginia has a transportation privilege tax, and a consumers sales tax, and a use tax, and a corporate net income tax. W. VA. CODE, c. 11, arts. 12A, 15, 15A, and 24.

This appeal involves none of these. It involves the utility privilege under the Business and Occupation Tax, which is basically a privilege tax measured by gross receipts. W. VA. CODE, c. 11, art. 13, §§ 2, 2-d.*

Any appraisal of the effect of gross receipts taxes on interstate commerce requires study of the exhaustive analysis of Part V ("Gross Receipts Taxes") in Volume 3 of SPECIAL SUBCOMMITTEE, HOUSE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H. R. Rep. No. 565, 89th Cong., 1st Sess. 1005-1114 (1965). This Report, hereinafter cited as "STIC", offers major support for plenary consideration of this appeal, which documents the pyramiding effect of gross receipts taxes.

At the time of this Congressional study, only eight States employed a gross receipts tax "of general applicability" like West Virginia's (STIC, at 1009). Twenty-five States, however, had so-called severance taxes,

* Apparently to avoid other Commerce Clause problems, some of the "privileges" are taxed on other bases than actual gross receipts. For example, W. VA. CODE, c. 11, art. 13, §2 prescribes several special rules for manufacturers and for producers of natural resources—apparently to conform to Commerce Clause limitations laid down in cases such as *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927). This decision limited an earlier version of West Virginia's gross receipts tax to the wellhead value of any gas transported by interstate pipelines out of West Virginia to other States.

which the Special Subcommittee pointed out were practically identical in effect to general gross receipts taxes, although limited to "natural resources or on the privilege of extracting or producing them or on their conservation" (STIC, at 1011-12). Included in the roster of States with gross receipts or severance taxes on the production of gas are all five—Louisiana, Texas, Virginia, Kentucky, and West Virginia—which contribute to United Fuel's overall gas supply (R. 95; STIC, at 1009, n. 2, and 1012, n. 16). Consequently, every cubic foot of the gas which United Fuel sold to Du Pont, Elk Refining, and Kaiser was subjected to gross receipts taxation at the point of production.*

The Supreme Court of Appeals of West Virginia has now ruled that mainline industrial sales of gas in interstate commerce are subject to a second layer of gross receipts taxation, at the rate of 3.9% of the gross income. No deduction is allowed on account of the basic cost of the gas to United Fuel, which cost included the severance-type gross receipts taxes already paid in Louisiana or Texas or Virginia or Kentucky. W. VA. CODE, c. 11, art. 13, §§ 1, 2, 2-d.

United Fuel's three mainline industrial customers are manufacturers (*supra*, pp. 7, 9, 9-10), and are thus subject to the manufacturers' gross receipts tax of W. VA. CODE, c. 11, art. 13, § 2-b. No deduction is allowed for the price paid United Fuel for the gas, including gross receipts taxes previously paid on account of production or severance, or on account of United Fuel's mainline industrial sale.

---

* In recent years, a part of United Fuel's gas supply may have come from offshore Louisiana gas fields beyond the Louisiana jurisdiction. This would not be subject to a severance tax.

Virtually all of Du Pont's products are immediately transshipped out of West Virginia (*supra*, p. 7). The record is silent on the destination of the Elk Refining and Kaiser products—but if they stay in West Virginia, they ultimately become subject to the wholesalers' and then the retailers' gross receipts taxes under W. VA. CODE, c. 11, art. 13, § 2-c, without deduction on account of any embedded costs, including gross receipts taxes previously paid at any stage.

This Court has held from the beginning that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). The facts of the case at bar validate the proposition, and suggest the powerful economic burden that a State's tax policies can lay on interstate commerce.

The Majority Opinion has been shown to conflict with decisions in other States on mainline industrial sales of gas in interstate commerce. More importantly, the entire case typifies the never-ending pressure by State taxing authorities to erode Commerce Clause principles, and to expand the power of the States to control the national economy by their parochial tax policies. The Special Subcommittee referred to this tendency, and suggested that one result is likely to be "an expansion in the area of interstate commerce of this form of taxation, with an accompanying increase in the incidence of multiple taxation." (STIC. at 1032.)

Even if the case at bar stood for nothing beyond the natural gas industry, it would be a case of substance. Industrial sales of gas now account for nearly two-thirds of the total national usage. FEDERAL POWER COMMISSION, 1968 ANNUAL REPORT 46 (1969). Mainline in-

dustrial sales, direct from the interstate gas transmission system, represent the bulk of the industrial sales in interstate commerce. In United Fuel's case, 85% of all industrial sales in 1961 were mainline sales (X 26, pp. 518-19). Finally, the mainline sales at transmission pressures involve sales to basic industry:

> "Some of the largest industrial markets are for electric generation, the chemical industry (including raw material use [as in United Fuel's sale to Du Pont]), the iron and steel industry, oil refinery processes [as in United Fuel's sale to Elk Refining], and the manufacture of paper and nonferrous metals [as in United Fuel's sale to Kaiser]." FEDERAL POWER COMMISSION, FORTY-FIFTH ANNUAL REPORT 115 (1966).

The Court's decisions, of course, can not be restricted to a single line of commerce. The issues presented in this appeal would appear to be of significance to all basic industry.

Respectfully submitted,

C. E. GOODWIN
H. L. SNYDER

Counsel for Plaintiff-Appellant,
United Fuel Gas Company

P. O. Box 1273
Charleston, West Virginia 25325

September 17, 1969

No. ———

IN THE

Supreme Court of the United States

UNITED FUEL GAS COMPANY, a corporation,
Appellant,

v.

CHARLES H. HADEN, II,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

APPENDIX A
OPINIONS AND ORDERS BELOW

PART ONE: THE OPINION BY HAYMOND, JUDGE*

Judge Berry, deeming himself disqualified, did not participate in the consideration or decision of this case.
Judge Haymond dissents in part.

Judge Calhoun reserves the right to file a concurring opinion.

* This is the dissenting opinion on the questions raised in this appeal, but the majority opinion on all other questions. It has not been officially reported, but it is unofficially reported in 167 S.E. 2d 890-920.

No. 12706

UNITED FUEL GAS COMPANY, a corporation

v.

G. THOMAS BATTLE,
TAX COMMISSIONER OF WEST VIRGINIA,

Kanawha County

Affirmed in part,
reversed in part,
remanded with directions

Haymond, Judge

1. When a lessee under an oil and gas lease produces gas from the well the right to produce such gas becomes a vested right and when the gas is extracted the title to the gas vests in the lessee and the consideration or rental paid for the privilege of search and production is rent for the leased premises.

2. All free gas produced by the lessee and furnished by the lessee to the lessor, pursuant to a covenant in an oil and gas lease, whether the amount of such gas is measured by meter or is otherwise determined, is taxable at the rate provided by Section 2a, Article 13, Chapter 11, Code, 1931, as amended, upon the basis of the value of such free gas at the well at which such gas is produced.

3. Wholesale sales in this State by a public utility to wholesale customers of gas produced in this State by other producers, after such gas has been transported by such utility to Kentucky and then returned to this State for transportation and sale by such wholesale cus-

tomers to consumers within or without this State are not a subject of interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c, Article 13, Chapter 11, Code, 1931, as amended, for wholesale sales of gas produced in this State; and wholesale sales in this State by such utility to wholesale customers of gas produced in this State by other producers before such gas has been transported by such wholesale customers from this State to any other state for sale to consumers in that state or for sale to consumers in this State are not a subject of interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c for wholesale sales of gas produced in this State. With respect to such sales the transportation of the gas had ended or had not occurred at the time such sales were made.

4. Wholesale sales by a public utility in this State to wholesale customers of gas produced in this State, the quantity of which can be determined with reasonable accuracy, and which by such wholesale customers is commingled with imported gas and transported by their pipelines from one point to another point in this State for sale and consumption in this State are not sales in interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c, Article 13, Chapter 11, Code, 1931, as amended, for the wholesale sale of such gas.

5. A state by its legislature may make reasonable classifications in enacting statutes provided the classifications are based on some real and substantial relation to the objects sought to be accomplished by the legislation, and a person who assails any such classification

has the burden of showing that it is essentially arbitrary and unreasonable.

6. Wholesale sales of natural gas by a public utility to industrial consumers within its utility service territory under special industrial contracts constitute the supplying of public service within the meaning of Section 2d, Article 13, Chapter 11, Code, 1931, as amended, and the taxation of such sales at a higher rate than is imposed by Section 2c of the same article and chapter upon an unregulated nonutility which makes the same kind of wholesale sales to industrial consumers is not violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States or of Article X, Section 1 of the Constitution of West Virginia.

7. The transportation of southwestern gas produced from wells in Texas and Louisiana, purchased by a utility operating in this State, part of which gas is transferred to such utility in its high pressure transmission lines at a point in this State and the other part of which gas is transferred to such utility in its high pressure transmission lines at a point outside this State, and all of which gas is transported direct from such points, after temporary delay in some instances in underground storage fields, to the plant of the consumer in this State where it is used and consumed, is not a transaction in interstate commerce. The sale of such gas to such consumer constitutes a local or intrastate transaction, is taxable by this State, and is not excluded from taxation by Section 2d, Article 13, Chapter 11, Code, 1931, as amended, which provides that the measure of such tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign coun-

tries. (By the majority of the Court; Judge Haymond dissents.)

8. When, upon appeal, the taxpayer shows reasonable cause for his failure to return or to pay the proper amount of the tax assessed against him and the tax commissioner refuses to waive any penalties imposed by him, the appellate court, in the exercise of its jurisdiction to hear and determine such appeal, may set aside and vacate any penalties imposed by the tax commissioner.

Haymond, Judge:

This is an appeal upon the application of the defendant, G. Thomas Battle, Tax Commissioner of the State of West Virginia, hereinafter sometimes referred to as tax commissioner or commissioner, from the final judgment of the Circuit Court of Kanawha County rendered April 21, 1967, which affirmed in part and reversed in part certain business and occupation tax levies imposed by the defendant against the plaintiff, United Fuel Gas Company, a corporation, hereinafter sometimes referred to as United Fuel. The taxes levied by the commissioner amounted to $971,167.37 and the penalties imposed amounted to $353,186.02, or a total amount of taxes and penalties of $1,324,353.39.

The issues presented to the circuit court upon the appeal to that court from a reassessment made by the commissioner are set forth in an agreed stipulation and are designated as agreed issues Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14. By its final judgment the circuit court reversed the action of the commissioner on these agreed issues: Issue No. 1, dealing with free gas furnished the lessor by the plaintiff as lessee in

certain oil and gas leases held by the plaintiff; Issues Nos. 2 and 3, relating to sales of gas in interstate commerce; Issue No. 10, relating to imported gas, supplied or furnished by the plaintiff under special industrial sales agreements to E. I. duPont de Nemours and Company, Kaiser Aluminum and Chemical Corporation, and Elk Refining Company; Issues Nos. 12 and 13, relating to the penalties imposed by the commissioner, and affirmed the action of the commissioner on agreed Issues Nos. 4, 5 and 6, relating to gas produced in West Virginia and purchased and sold by the plaintiff to West Virginia customers; and Issues Nos. 7, 8 and 9, relating to certain sales of gas by the plaintiff to certain industrial consumers.

The circuit court found that Issue No. 11 did not relate to any present claim or justiciable controversy but was merely indicative of possible future disputes and accordingly rendered no decision on that issue, and rejected the contention of the plaintiff on Issue No. 14 that the business and occupation taxes involved in this proceeding covering the five year period 1957 to 1961 were barred by the provisions of Section 19a Article 2, Chapter 55, Code, 1931, as amended.

By its final judgment the circuit court on Issues Nos. 4, 5 and 6 upheld the commissioner's levy of $3,209.84, on Issues Nos. 7, 8 and 9 upheld the commissioner's levy of $84,714.19; and on Issue No. 1 relating to certain free gas which the plaintiff concedes is taxable, the circuit court allowed $4,158.19 and on oil production, tank car rentals and royalties allowed $167.01, entered judgment upon the total of the foregoing levies in the amount of $92,249.23, and remitted all penalties imposed by the commissioner. The circuit court denied the motions of both parties to set aside the foregoing judg-

ment and to rehear and reconsider its ruling upon the issues determined and also denied the motion of the commissioner to substitute in lieu of the judgment of $92,249.23, a judgment against the plaintiff for taxes in the sum of $971,167.37 and penalties in the sum of $353,186.02, aggregating the sum of $1,324,353.39. From the foregoing judgment this Court awarded this appeal and supersedeas upon the application of the commissioner. On this appeal the commissioner seeks reversal of the action of the circuit court on Issues Nos. 1, 10, 12 and 13, and the plaintiff, by cross-assignment of error, seeks reversal of the action of the circuit court upon Issues Nos. 4, 5, 6, 7, 8 and 9.

The statutes directly involved in this proceeding are Sections 2, 2a, 2c and 2d, Article 13, Chapter 11, Code, 1931, as amended.

The plaintiff, a West Virginia corporation and a public utility subject to regulation by the Public Service Commission of this State and the Federal Power Commission, is primarily engaged in the production, transmission, distribution and sale of natural gas, both at wholesale and retail, in this State, and is also engaged in the sale and the leasing of certain tangible property. During the year 1961, which is the year stipulated by the parties as the typical year to illustrate the layout, structure and facilities of the plaintiff, the plaintiff served an average of 113,458 residential commercial and industrial consumers from its distribution systems with 24,928,857 Mcf of natural gas; 26 industrial customers from other than local distribution systems with 14,203,393 Mcf of natural gas, and it sold to 14 other companies 210,920,363 Mcf of natural gas for resale, both inside and outside this State. The greater portion of the total volume of natural gas sold by the plaintiff, both at wholesale and retail, in

West Virginia is imported into this State and consists of southwestern gas produced in Texas and Louisiana and to a lesser extent in Kentucky and Virginia. During the year 1961 of the total volume of natural gas entering plaintiff's pipelines in Kentucky, Virginia and West Virginia, 82% was southwestern gas, 7% was Kentucky and Virginia gas and 11% was gas produced in West Virginia. The plaintiff obtained the southwestern gas by two methods (1) by purchasing the gas from Tennessee Gas Transmission Company which acquired the gas from wells in Texas and Louisiana and transported it through that company's pipelines to points in West Virginia and Kentucky and (2) by the plaintiff's own purchase of natural gas for resale from wells located in southern Louisiana and transported by pipelines owned and operated by Columbia Gulf Transmission Company to the plaintiff's facilities at various points in Kentucky, from which points the gas was brought into West Virginia, by the pipelines of the plaintiff. Approximately 80% of the property of the plaintiff used in its integrated system in 1961 was located in this State and the total depreciated original cost of all such property was $165,736,314.00 and the portion in West Virginia was valued at $132,892,508.00. Its property includes producing oil and gas wells, compressor stations, regulators, meters, various sizes of pipelines, underground storage fields, products extraction plants, machinery, office furniture and equipment and other assets. In 1961 it employed 2200 persons in West Virginia and its gross income from all sales of gas in that year was $214,673,623.00 and from gas sales of all types at West Virginia delivery points amounted to $109,465,235.00. The business activities of the plaintiff in this State involved in this appeal are the production

of natural gas and the sale by plaintiff under special contracts to various industrial consumers, among them E. I. du Pont de Nemours and Company, Elk Refining Company and Kaiser Aluminum and Chemical Corporation, which are served with natural gas imported into this State and delivered through plaintiff's transmission lines. Other industrial consumers in this State are supplied with natural gas which is delivered from its distribution pipelines and plants.

After an audit of the business activities of the plaintiff in this State the defendant on December 10, 1963, issued an original assessment of business and occupation taxes against the plaintiff in the sum of $1,782,550.88 and imposed a penalty in the sum of $642,437.69 or a total of $2,424,988.57 for the period 1957 to 1961, inclusive. After the plaintiff was served with that assessment it filed a petition for a reassessment of the tax and penalty on January 9, 1964 and assigned numerous errors in such assessment. The defendant conducted an administrative hearing upon the petition and by a ruling of May 18, 1965 served upon the plaintiff on May 26, 1965, the defendant reduced the claim against the plaintiff for business and occupation taxes from $1,782,550.88 to $971,167.37 and imposed a penalty upon that amount of $353,186.02 or a total of taxes and penalties of $1,324,353.39 for the assessment period 1957 through 1961.

On June 24, 1965, the plaintiff appealed the ruling of the defendant to the Circuit Court of Kanawha County by serving the defendant with written notice of such appeal and filing the notice in the office of the Clerk of the Circuit Court, and in the notice assigned numerous errors in the rulings of the defendant. By his answer filed July 20, 1965 the defendant denied the allegations of error set forth in the notice. The facts and the issues

have been stipulated and, there being no substantial factual dispute, the case was submitted to the circuit court on April 18, 1966 for decision upon the notice of appeal, the answer of the defendant, the stipulation between the parties and eight volumes of stipulated exhibits. By its final judgment rendered April 21, 1967, the circuit court resolved Issues Nos. 1, 2, 3, 10, 12 and 13 in favor of the plaintiff and Issues Nos. 4, 5, 6, 7, 8, 9 and 14 in favor of the defendant, set aside the penalty imposed, and entered judgment in favor of the defendant and against the plaintiff for $92.249.23, with interest from the date of the judgment. The circuit court also prepared a lengthy memorandum of opinion which is filed as part of the record in this proceeding.

On April 30, 1968, this appeal was heard in this Court and this proceeding was submitted for decision upon the transcript of the record in the circuit court, including the pleadings, the written briefs as amici curiae by counsel for E. I. duPont de Nemours and Company and by counsel for Kaiser Aluminum and Chemical Corporation, and the printed briefs and the oral arguments of attorneys in behalf of each of the parties.

The defendant assigns as error the action of the circuit court in deciding Issues Nos. 1, 10, 12 and 13 for the plaintiff and against the defendant, and in denying the motion of the defendant that the judgment for $92.249.23 be set aside, its motion for rehearing and reconsideration of the action of the circuit court upon Issues Nos. 1, 10, 12 and 13, and its motion for a new judgment for the amount of the taxes and the penalty claimed by the defendant.

Issue No. 1 involved the question of the taxability under section 2a, Article 13, Chapter 11, Code, 1931, as

amended, as a part of the production of gas by plaintiff, of free gas delivered by the plaintiff to its lessors from the wells of the plaintiff on lands of the lessors pursuant to covenants in oil and gas leases, such free gas having been taken by the lessors before measurement of the gas at its wells to determine the amount of the gas royalty to be paid to the lessors by the lessees.

Section 2a, relating to the tax imposed by Section 2, to the extent here pertinent, provides that: "Upon every person engaging or continuing within this State in the business of producing for sale, profit or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: * * *; natural gas, in excess of the value of five thousand dollars, seven and eighty-five one-hundredths per cent; * * *. The measure of this tax is the value of the entire production in this State, regardless of the place of sale or the fact that the delivery may be made to points outside the State."

Prior to 1959 the plaintiff reported for taxation under Section 2a all deliveries of free gas made by it to its lessors but after the decision of the case of Triad Oil Company v. Ferguson, decided by the Circuit Court of Kanawha County on July 8, 1955 and in which case an application for review upon certificate was denied by this Court on September 26, 1955, the plaintiff omitted all free gas deliveries from its reports in determining its gas production for taxation. In the Triad Oil Company case the circuit court, in a memorandum opinion, held that the Legislature had failed to provide the means of measuring the tax upon the payment of

oil royalty and that for that reason the lessee in an oil and gas lease was not liable under Section 2a for taxes on oil royalties paid in kind.

The plaintiff contends that the Triad Oil Company case applies to and relieves the free gas, produced and delivered prior to its measurement by meter by the lessee, from taxation under Section 2a; and that such free gas is also not subject to taxation for the reason that it is not owned by the lessee but instead is owned by the lessors and in consequence no sale of it is made by the lessee. The circuit court, applying the principle of the Triad Oil Company case and finding that no sale had been made of the free gas delivered before its quantity was measured by meter, held that such free gas was not taxable under the provisions of Section 2a.

Though the plaintiff now concedes that the free gas delivered by it after its measurement by meter is taxable production of gas, there is no merit in the contention of the plaintiff that the unmeasured free gas is owned by the lessors instead of the lessee and that because no sale was made of such gas it is not taxable under the foregoing statutory provisions. It is well established by numerous decisions of this Court that when a lessee under an oil and gas lease produces gas from the well the right to produce such gas becomes a vested right and when the gas is extracted the title to the gas vests in the lessee and the consideration or royalty paid for the privilege of search and production is rent for the leased premises. See Shearer v. Allegheny Land and Mineral Company, W.Va. 165 S.E.2d 369; Shearer v. United Carbon Company, 143 W.Va. 482, 103 S.E.2d 883; Engel v. Eastern Oil Company, 100 W.Va. 301, 130 S.E. 491; Campbell v. Lynch, 81 W.Va. 374, 94 S.E. 739, L.R.A.1918B 1070; South Penn Oil

Company v. Snodgrass, 71 W.Va. 438, 76 S.E. 961, 43 L.R.A.,N.S., 848; McGraw Oil Company v. Kennedy, 65 W.Va. 595, 64 S.E. 1027, 23 L.R.A..N.S., 959; Headley v. Hoopengarner, 60 W.Va. 626, 55 S.E. 744; Urpman v. Lowther Oil Company, 53 W.Va. 501, 44 S.E. 433, 97 Am.St.Rep. 1027; Parish Fork Oil Company v. Bridgewater Gas Company, 51 W.Va. 583, 42 S.E. 655, 59 L.R.A. 566; Steelsmith v. Gartlan, 45 W.Va. 27, 29 S.E. 978, 44 L.R.A., 107; Crawford v. Ritchey, 43 W.Va. 252, 27 S.E. 220. See also McIntosh v. Vail, 126 W.Va. 395, 28 S.E.2d 607, 151 A.L.R. 804; Warren v. Boggs, 83 W.Va. 89, 97 S.E. 589. This Court has also held that free gas for the lessor is part of the consideration of a lease for oil and gas purposes, Kimble v. Wetzel Natural Gas Company, 134 W.Va. 761, 61 S.E.2d 728; Bassell v. West Virginia Central Gas Company, 86 W.Va. 198, 103 S.E. 115, 12 A.L.R. 1358; Herbert v. Hope Natural Gas Company, 76 W.Va. 207, 84 S.E. 770, L.R.A.-1915E 570; South Penn Oil Company v. Edgell, 48 W.Va. 348, 37 S.E. 596, 86 Am.St.Rep. 43; and that the covenant to furnish free gas runs with the land and may be enforced. Kimble v. Wetzel Natural Gas Company, 134 W.Va. 761, 61 S.E.2d 728; Ketchum v. Chartiers Oil Company, 121 W.Va. 503, 5 S.E.2d 414; Bassell v. West Virginia Central Gas Company, 86 W.Va. 198, 103 S.E. 116, 12 A.L.R. 1398; Herbert v. Hope Natural Gas Company, 76 W.Va. 207, 84 S.E. 770, L.R.A.1915E 570; Hall v. Philadelphia Company, 72 W.Va. 573, 78 S.E. 755. The question of the ownership of the gas when it is discovered and extracted, despite the argument of the plaintiff in support of the ownership by the lessor instead of the lessee of the unmetered and unmeasured free gas, is not important or controlling. Regardless of the ownership of such gas it is clear that all free gas

involved in this proceeding is produced by the plaintiff as lessee in its various leases. It is the production of gas, not its ownership, which is subjected to taxation under Section 2a. The value of gas produced is its value when production ends which in this instance is at the well: Soto, Tax Commissioner v. Hope Natural Gas Company, 142 W.Va. 373, 95 S.E.2d 769; Hope Natural Gas Company v. Hall, 102 W.Va. 272, 135 S.E. 582; Hope Natural Gas Company v. Hall, 274 U.S. 284, 47 S.Ct. 639; 71 L.Ed. 1049. Though there is no sale, in the ordinary sense, of the free gas furnished to the lessor, no sale of such gas is necessary to subject it to the tax. The plaintiff is a person engaging within this State in the business of producing natural gas for sale, profit or commercial use within the meaning of Section 2a and the measure of the tax mentioned in the section is the value of the entire production in this State regardless of the place of sale or the fact that the delivery may be made to points outside the State. It is evident that the value of the free gas at the well is the same as the value of all other gas produced at the well which is sold and delivered to its consumers by the plaintiff; and, on the basis of that valuation all the free gas furnished by the plaintiff to its lessors is subject to the tax provided by Section 2a. The amount of the tax levied by the defendant on all the free gas is $7,295.08. That levy should have been sustained by the circuit court and its action in vacating and setting it aside constitutes reversible error. The plaintiff concedes on this appeal that 57% of such free gas, which represents the amount of the free gas delivered to its lessors after measurement, is subject to the tax in the amount of $4,158.19 but that the remaining 43% of the free gas so furnished before measurement by meter is not subject to the tax. This

contention, as indicated, is devoid of merit and the defendant is entitled to recover not only the amount of $4,158.19 which the plaintiff concedes that it owes but also the total amount of the levy of $7,295.08, which includes the amount of $4,158.19, upon the value of all the free gas produced by the plaintiff. All free gas produced by the lessee and furnished by the lessee to the lessor, pursuant to a covenant in an oil and gas lease, whether the amount of such gas is measured by meter before its delivery or is otherwise determined, is taxable at the rate provided by Section 2a, Article 13, Chapter 11, Code, 1931, as amended, upon the basis of the value of such free gas at the well at which such gas is produced. See Hope Natural Gas Company v. Hall, 102 W.Va. 272, 135 S.E. 582; Hope Natural Gas Company v. Hall, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed 1049.

Issues Nos. 4, 5 and 6 relate to gas produced in West Virginia which is purchased and sold at wholesale by the plaintiff to other wholesale customers and is resold and transported by them to some consumers inside and to some consumers outside this State. Some of this gas is sold to Atlantic Seaboard Corporation, The Manufacturers Light and Heat Company, and Cumberland and Allegheny Gas Company and by those companies transported and sold for consumption both inside and outside this State.

Issue No. 4 deals with gas produced in West Virginia by other companies which is purchased by the plaintiff and transported by means of its pipelines into Kentucky and back into West Virginia where it is sold by the plaintiff at wholesale to other wholesale customers who, after temporary underground storage of the gas in this State, remove such gas from storage and (a) transport it by means of pipelines out of this State to points of con-

sumption in other states, or (b) transport it by pipelines out of this State and then return it for sale and consumption in this State, or (c) transport such gas by means of pipelines to points of resale and ultimate public consumption in this State.

Issue No. 5 deals with gas produced in West Virginia by other companies which is purchased by the plaintiff and transported by its pipelines to the point of sale by wholesale in West Virginia to wholesale customers who, after temporary underground storage of the gas in West Virginia, subsequently remove it from such storage and dispose of it in the same manner as is indicated in Issue No. 4. As between Issues Nos. 4 and 5 the difference is that the gas involved in sales in Issue No. 4 is transported by means of the pipelines of the plaintiff into Kentucky before it is sold in West Virginia and the gas in Issue No. 5 is transported by the plaintiff and sold to its customers in West Virginia.

Issue No. 6 deals with gas produced in West Virginia by other companies which is purchased by the plaintiff, is commingled with imported gas in the pipelines of the plaintiff, is sold at wholesale to wholesale customers and is subsequently sold and delivered by them to consumers in West Virginia. The traffic of the gas begins and ends in this State and is for the purpose of taxation treated as an intrastate journey.

The question presented by Issues Nos. 4, 5 and 6, with respect to wholesale sales by the plaintiff of gas produced in this State to other wholesale customers, is whether the gross income of the plaintiff from such wholesale sales is taxable under the provisions of Section 2c, Article 13, Chapter 11, Code, 1931, as amended; or is exempt from taxation by virtue of the Commerce

Clause, Article I, Section 8 of the Constitution of the United States as income derived from transactions in interstate commerce.

Section 2c, Article 13, Chapter 11, Code, 1931, as amended, to the extent here pertinent, provides that "Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, * * *, there is likewise hereby levied, and shall be collected, a tax equivalent to one half of one per cent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-five one-hundredths of one per cent of the gross income of the business."

The plaintiff contends that the foregoing wholesale sales of West Virginia gas to wholesale customers and by them resold to consumers are transactions in interstate commerce and are not subject to the tax imposed by Section 2c. On the contrary the defendant asserts that all such sales are not sales in interstate commerce but are local transactions and are subject to the designated tax. The circuit court held that all such sales were local, and not interstate, transactions, and as such were taxable, and approved the levy in the aggregate of $3,209.84 which embraced all the sales involved in Issues Nos. 4, 5 and 6, and that amount was included in the judgment of $92,249.23.

It is clear that the transportation to Kentucky and then back to West Virginia of the West Virginia gas purchased by the plaintiff in West Virginia from other producers, before it is sold at wholesale to other wholesale customers, does not, for the purpose of taxation, constitute an interstate journey. The transportation of the gas began in West Virginia and after passing through

Kentucky it ended in this State. Passage of the gas through Kentucky between the West Virginia termini is, for all practical purposes, intrastate or domestic and not interstate or foreign in character. Norfolk and Western Railway Company v. Field, 143 W.Va. 219, 100 S.E. 2d 796. In that case this Court held in point 7 of the syllabus that "Though traffic commonly referred to as loop traffic is technically interstate commerce, it may, in certain or particular circumstances, be taxed as business done within the State to which it bears a special relation." There the traffic originated and ended in this State but moved over approximately 5.48 miles of railroad in Virginia and 0.28 of a mile in Kentucky. In that case this Court, quoting from People of the State of New York ex rel. Cornell Steamboat Company v. Sohmer, 235 U.S. 549, 35 S.Ct. 162, 59 L.Ed. 355, used this language: "Transportation between ports of a State is not interstate commerce to the extent of being excluded from the taxing power of the State because a part of the journey is over the territory of another State;". See also International Harvester Company v. Department of Treasury, 322 U.S. 340, 64 S.Ct. 1019, 1030, 88 L.Ed. 1313; Lone Star Gas Company v. Texas, 304 U.S. 224, 58 S.Ct. 883, 82 L.Ed. 1304; Lehigh Valley Railroad Company v. Pennsylvania, 145 U.S. 192, 12 S.Ct. 806, 36 L.Ed. 672. The headnote to the International Harvester Company case contains this language: "An Indiana tax upon gross income, as applied to receipts from the following classes of sales by a foreign corporation authorized to do business in Indiana, was not precluded by the Commerce Clause or the Fourteenth Amendment: (1) sales by out-of-State branches to Indiana dealers and users, where delivery is taken at plants of the corporation in Indiana; (2) sales to out-of-State

buyers who come to Indiana, take delivery there, and transport the goods to another State; (3) sales in Indiana to Indiana buyers, where the goods are shipped from out-of-State points to the buyer." With respect to sales made outside Indiana to dealers and users residing in Indiana to whom deliveries were made in Indiana the court said: "These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions." In the *Lehigh Valley Railroad Company* case the headnote states that "A state tax against a railroad corporation, incorporated under its laws, on account of transportation done by it from one point within the State to another point within it, but passing during the transportation without the State and through part of another State, is not a tax upon interstate commerce, and does not infringe the provisions of the Constitution of the United States." In the opinion the court said: "The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State, but the contention is that this could not be done because the transportation was an entire thing and in its course passed through another State than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State

may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line on to the soil of another State?

"* * *

"It should be remembered that the question does not arise as to the power of any other State than the State of termini, * * *, but it is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

The action of the court in *Lehigh Valley Railroad Company* case in considering carriage of freight and passengers between two points in one State to be local rather than foreign business is criticized in the opinion in the later case of Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 in this language: "To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the *Lehigh Valley* case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction." Notwithstanding this criticism, however, the Court, in the *Mealey* case agreed that the State tax under consideration in the *Lehigh Valley Railroad Company* case, as apportioned, even though it affected interstate commerce, was valid because it did "not burden interstate commerce in the constitutional sense."

For the same reason that the sale of gas transported from West Virginia into Kentucky and back into West Virginia, before its sale by the plaintiff, is considered to be a domestic or an intrastate transaction and not a foreign or an interstate transaction, the sale of gas transported by the wholesale customer from this State for consumption in other States or returned to this State, after completion of the wholesale sale of such gas by the plaintiff, is likewise a domestic or an intrastate transaction and not a foreign or an interstate transaction.

In support of the contention of the plaintiff that the wholesale sales involved in Issues Nos. 4, 5 and 6 constitute transactions in interstate commerce and for that reason are not subject to the tax imposed by Section 2c, the plaintiff cites and relies upon Hope Natural Gas Company v. Hall, 102 W.Va. 272, 135 S.E. 582; Hope Natural Gas Company v. Hall, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049; Eureka Pipe Line Company v. Hallanan, 257 U.S. 265, 42 S.Ct. 101, 66 L.Ed 227; United Fuel Gas Company v. Hallanan, 257 U.S. 277, 42 S.Ct. 105, 66 L.Ed. 234; Michigan-Wisconsin Pipe Line Company v. Calvert, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583, and numerous other cases. Each of the cited cases is clearly distinguishable from the facts involved in Issues Nos. 4, 5 and 6 in this proceeding.

A State, by appropriate legislation, may impose a privilege tax upon a person engaged in both interstate and intrastate commerce if such tax is imposed solely upon its intrastate business and such business can be separated and distinguished from its interstate business. See State ex rel. Battle v. Baltimore and Ohio Railroad Company, 149 W.Va. 810, 143 S.E.2d 331, certiorari denied, 384 U.S. 970, 86 S.Ct. 1859, 16 L.Ed.2d 681;

American Barge Line Company v. Koontz, 136 W. Va. 747, 68 S.E.2d 56; Dravo Contracting Company v. James, 114 F.2d 242; Cooney v. Mountain States Telelphone and Telegraph Company, 294 U.S. 384, 55 S.Ct. 477, 79 L.Ed. 934; East Ohio Gas Company v. Tax Commission of Ohio, 283 U.S. 465, 51 S.Ct. 499, 75 L.Ed. 1171; Sprout v. City of South Bend, 277 U.S. 163, 48 S.Ct. 502, 72 L.Ed. 833, 62 A.L.R. 45; Air-Way Electric Appliance Corporation v. Day, 266 U.S. 71, 45 S.Ct. 12, 69 L.Ed. 169; Allen v. Pullman's Palace Car Company, 191 U.S. 171, 24 S.Ct. 39, 48 L.Ed. 134; Ratterman v. Western Union Telegraph Company, 127 U.S. 411, 8 S.Ct. 1127, 32 L.Ed. 229; Bowman v. Continental Oil Company, 256 U.S. 642, 41 S.Ct. 606, 65 L.Ed. 1139. As the amount of the gas produced in this State which is commingled with the imported gas, though not measured, can be determined with reasonable accuracy, the wholesale sale by the plaintiff of such gas to its wholesale customers is subject to the tax at the rate provided by Section 2c for wholesale sales of gas. In the *Hope Natural Gas Company* case it was held that, though no business and occupation tax could be imposed upon the gas produced in this State after it entered interstate commerce, the State may take into consideration the gross proceeds of a commodity produced in this State and sold in another state but only for the purpose of determining the value of such commodity within the State and before it entered interstate commerce. In the *Eureka Pipeline Company* case the court held that the oil involved in that case become a part of a stream of oil passing through and out of the State and was interstate commerce, and that a tax on the transportation of such oil insofar as measured by the quantities produced in but moving out of West Virginia was void under the Commerce Clause; and in the *United Fuel Gas Company*

case the court held that natural gas, collected and purchased by a pipeline company within a State and moving through its pipes and the pipes of other companies to which it sells, in continuous streams destined beyond the State, is a subject of interstate commerce, and that the transportation of such gas is not subject to tax by the State. As the wholesale sales of the gas involved in Issues Nos. 4, 5 and 6 were not subjects of interstate commerce, the three last cited cases are clearly inapplicable to and do not control the decision of those issues.

Whether the transportation by the plaintiff of West Virginia gas into Kentucky and back into West Virginia before it made a wholesale sale of the gas in West Virginia to a wholesale customer or the transportation by a wholesale customer of West Virginia gas outside West Virginia and then back into West Virginia after the wholesale sale of the gas by the plaintiff in West Virginia to such wholesale customer is considered to be a transaction in intrastate or interstate commerce is not controlling in the determination of the validity of the tax imposed on such wholesale sale for the reason that the transportation of the gas by the plaintiff of the West Virginia produced gas into Kentucky and back into West Virginia, had ended at the point of sale before the sale was made, and the sale of the gas purchased by the wholesale customer which it transported outside this State and then back into this State and resold for consumption in this State was completed before such gas was transported from this State to any other state. It is, therefore, clear that none of such wholesale sales of the locally produced gas constituted a transaction in interstate commerce. Each of such sales, being a local transaction, is subject to the tax on wholesale sales imposed by Section 2c, Article 13,

Chapter 11, Code, 1931, as amended. Wholesale sales in this State by a public utility to wholesale customers of gas produced in this State by other producers, after such gas has been transported by such utility to Kentucky and then returned to this State for transportation and sale by such wholesale customers to consumers within or without this State are not a subject of interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c for wholesale sales of gas produced in this State; and wholesale sales in this State by such utility to wholesale customers of gas produced in this State by other producers before such gas has been transported by such wholesale customers from this State to any other state for sale to consumers in that state or for sale to consumers in this State are not a subject of interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c for wholesale sales of gas produced in this State. With respect to such sales the transportation of the gas had ended or had not occurred at the time such sales were made.

The wholesale sales by the plaintiff, involved in Issue No. 6, of gas produced in West Virginia by other companies, to wholesale purchasers, which was commingled by them with imported gas and transported to a point in West Virginia where it is sold and delivered to West Virginia consumers, is a local and not an interstate transaction. Its transportation with the commingled imported gas began and ended in West Virginia and the amount of the gas sold at wholesale by the plaintiff and transported and delivered in West Virginia by the wholesale customer is subject to the wholesale tax imposed by Section 2c. That the quantity of such gas can not be exactly

determined by actual measurement does not of itself make the transportation of the gas with the commingled imported gas a transaction in interstate commerce. It is evident that the amount of such gas can be determined and computed with sufficient accuracy to subject the wholesale sale of such gas to the taxation imposed upon such sale by Section 2c as a local or intrastate transaction. Wholesale sales by a public utility in this State to wholesale customers of gas produced in this State, the quantity of which can be determined with reasonable accuracy, and which by such wholesale customers is commingled with imported gas and transported by their pipelines from one point to another point in this State for sale and consumption in this State are not sales in interstate commerce but instead are local or intrastate transactions and as such are taxable at the rate provided by Section 2c, for the wholesale sale of such gas.

Issue No. 7 relates to sales by the plaintiff of gas to industrial consumers in this State under special contracts between the plaintiff and such industrial consumers. Fourteen such contracts with industrial customers are described in connection with Issue No. 7. The points of delivery under these contracts are all located in plaintiff's utility traffic service area and the gas delivered to special contract industrial consumers is metered and measured by regulation equipment of the plaintiff located on the premises of each industrial consumer. Eleven of these consumers are served by the pipelines in the distribution system of the plaintiff and three such special contract industrial consumers, E. I. duPont de Nemours and Company, Elk Refining Company and Kaiser Aluminum and Chemical Corporation, are served by the transmission pipelines of the plaintiff. The gas furnished to these

three consumers under special industrial contracts is dealt with specifically in Issue No. 10 and the gas furnished by the plaintiff to the eleven special contract industrial consumers is dealt with in Issue No. 7.

Issue No. 7 presents the question whether Section 2d, Article 13, Chapter 11, Code, 1931, as amended, in providing that the measure of the tax under that section shall include only gross income received from the supplying of public services and that the gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed by the appropriate section or sections of that article, excludes from its measure the gross income of the plaintiff from the sales of gas delivered in its West Virginia utility service territory to industrial consumers under special industrial contracts, individually negotiated, as distinguished from the gross income of the plaintiff from sales of gas to industrial and all other consumers who are served under its official utility tariff approved by the Public Service Commission, for direct consumption or use in the purchaser's business activity in West Virginia either (a) as a source of energy or (b) as a raw material ingredient or component part of a product which the purchaser manufactures for sale, and thus renders such gross income taxable under Section 2c as wholesale sales, on the ground that such special contracts of industrial sales are not the supplying of public services under the manifest legislative intent of Section 2d. That section, to the extent here pertinent, provides that "Upon any person engaging or continuing within this State in any public service or utility business, * * *, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multi-

plied by the respective rates follows: * * *; natural gas companies three and nine tenths per cent on the gross income, said gross income for this purpose to be determined by deducting from gross income from all sales of gas to consumers the amount of the tax paid by the taxpayer under section two-a [§ 11-13-2a] of this article on the production of the same gas; * * *. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

The plaintiff contends that special contracts are private, unregulated business, authorized by the Public Service Commission in an exercise of its reviewable discretion, and that such contracts are taxable only at the wholesale rate provided by Section 2c as nonutility sales of gas to manufacturers under tax regulation BOT-32 because they are not services under the official utility tariff and thus are not the supplying of public services within the meaning of Section 2d; that the supplying of public services includes only gross income from utility services under an official utility tariff; and that the gross income from special industrial contracts is taxable only under the wholesale rate of Section 2c as nonutility sales to manufacturers.

In opposition to the contentions of the plaintiff the defendant insists that the gas furnished industrial consumers under special industrial contracts is the supply-

ing of public services as provided by Section 2d; that the sales of gas under such special industrial contracts are not nonutility sales; and that such sales are taxable at the rate provided by Section 2d for the supplying of public services and are not taxable at the wholesale rate provided by Section 2c.

The circuit court held that the gas sold and furnished to industrial consumers under the special contracts involved in Issue No. 7 constituted the supplying of public services within the meaning of Section 2d, Article 13, Chapter 11, Code, 1931, as amended, and that such public services were taxable at the rate provided by that section.

The plaintiff furnishes gas to numerous industrial consumers with which it does not have special contracts and the price for the gas which it sells to its nonspecial industrial contract consumers is the rates prescribed in the official utility tariff established under the regulations of the Public Service Commission of West Virginia. These rates are higher than the rates set forth in the special industrial contracts which are agreed to and established by the parties to such special industrial contracts. Under special industrial contracts the utility can sell and the consumers are enabled to obtain large supplies of gas at a cost which, because of the lower rates, such consumers would be unwilling or could not afford to purchase at the higher rates established by the official utility tariff but such rates are, at any time, subject to regulation by the Public Service Commission. The contract rates are not regulated or established by the Federal Power Commission or by the Public Service Commission. The consumers served under the special industrial contracts are located in the utility territory of the plaintiff embraced in the Certificate of Public Convenience and Necessity

issued to the plaintiff by the Public Service Commission. The special industrial contracts here under consideration are filed with the Public Service Commission in accordance with Rule 39 of the Rules and Regulations promulgated by the commission. The gas furnished and sold to these special industrial consumers is delivered to their premises by the plaintiff and is metered by its measuring and regulating equipment located on the premises of such consumers and each of them uses and consumes the gas delivered to it under such contract in its business in the utility service territory of the plaintiff. The facilities used by the plaintiff in supplying gas to its special industrial contract consumers are a part of its integrated system by which it serves all of its consumers without distinction as to whether the consumer received gas under special industrial contracts or otherwise; and the plaintiff is a public utility within the meaning of Chapter 24, Code 1931, as amended, and is subject to regulation by the Public Service Commission of this State.

Section 1, Article 1, Chapter 24, Code provides that "Except where a different meaning clearly appears from the context the words 'public utility' when used in this chapter shall mean and include any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service, * * *". Section 1, Article 2, Chapter 24, Code, 1931, as amended, provides that the jurisdiction of the commission shall extend to all public utilities in this State, and shall include any utility engaged, among other activities, in the transportation of oil, gas or water by pipeline, and in any other public service.

Though the Public Service Commission has not regulated the special industrial contracts here under consideration or the rates provided by such contracts which are fixed by agreement of the parties to such contracts, the commission has the power and authority to do so in its discretion, and the absence of such regulation does not deprive it of its power and authority to regulate, modify or terminate such contracts in circumstances which justify such action. In Preston County Light and Power Company v. Renick, 145 W.Va. 115, 113 S.E.2d 378, this Court held in point 2 of the syllabus that "The public service commission of this State has authority to supervise, regulate, modify or approve a contract between public utilities subject to its jurisdiction, which affects the service rendered to the public or the rate charged for such service." In the opinion this Court said: "Though as a general rule public utilities have the right to enter into contracts between themselves or with others, free from the control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties, the principle is firmly established that all contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the state of its regulatory power whenever the public interest may make it necessary; and when such contracts are the subject of statutory regulation, no contract for service may be made by a public utility except as provided by law, although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority." See also Mountain State Water Company v. Town of Kingwood, 121 W. Va. 66, 1 S.E.2d 395; City of Charleston v. Public Service Commission, 86

W.Va. 536, 103 S.E. 673; Clarksburg Light and Heat Company v. Public Service Commission of West Virginia, 84 W.Va. 638, 100 S.E. 551; Mill Creek Coal and Coke Company v. Public Service Commission, 84 W.Va. 662, 100 S.E. 557, 7 A.L.R. 1081; City of Benwood v. Public Service Commission, 75 W.Va. 127, 83 S.E. 295, L.R.A. 1915C, 261; Wingrove v. Public Service Commission, 74 W.Va. 190, 81 S.E. 734, L.R.A.1918A, 210. In Wilhite v. Public Service Commission of West Virginia, 150 W.Va. 747, 149 S.E.2d 273, this Court said that the test as to whether a person, firm or corporation is a public utility is the dedication or holding out, either express or implied, that such person, firm or corporation is engaged in the business of supplying his or its product or services to the public as a class or any part of such public as distinguished from services to only particular individuals. It is clear that the plaintiff is a public utility and by engaging in the business of serving the public has dedicated its facilities to public service. The paramount duty of a public utility is to serve the public, including industrial consumers who demand its service within its public service territory. See United Fuel Gas Company v. Public Service Commission, 105 W.Va. 603, 144 S.E. 723; United Fuel Gas Company v. Public Service Commission, 95 W.Va. 415, 121 S.E. 281; Kelly Axe Manufacturing Company v. United Fuel Gas Company, 27 W.Va. 368, 105 S.E. 152; Mill Creek Coal and Coke Company v. Public Service Commission, 84 W.Va. 662, 100 S.E. 557, 7 A.L.R. 1881; Clarksburg Light and Heat Company v. Public Service Commission of West Virginia, 84 W.Va. 638, 100 S.E. 551. In the Clarksburg Light and Heat Company case this Court said "The duty of the petitioner to supply the public with gas is its paramount

duty. It makes no difference who that public is, or to what use the gas is to be appropriated."

It is clear that the plaintiff, as a public utility, is engaged in the service of the public in furnishing gas to its consumers, individual and industrial, in its service territory and that in furnishing gas to its industrial consumers under special industrial contracts it is engaged in the business of supplying public service within the meaning of Section 2d, Article 13, Chapter 11, Code, 1931, as amended; that the gross income received from such public service is taxable at the rate provided by that section for such service; and that the business of supplying such service is not a nonutility sale taxable at the wholesale rate provided by Section 2c. Accordingly, the action of the circuit court in resolving Issue No. 7 adversely to the plaintiff is, in all respects, correct and proper.

Issue No. 8 presents the question whether the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Article X, Section 1 of the Constitution of West Virginia prohibit the application of the higher tax rate provided by Section 2d to the gross income of the plaintiff from its special industrial contract sales in its utility service territory in West Virginia while the much lower wholesale sales rate of the tax provided by Section 2c is applied to the gross income derived from the unregulated wholesale sales of gas by nonutility gas companies to industrial consumers.

The plaintiff contends that discrimination in the different rates provided by the foregoing two sections is unconstitutional in that nonutility suppliers of the same industrial consumers are taxed under Section 2c at the

rate of twenty-five one-hundredths of one per cent of the gross income realized by them from wholesale sales of gas to industrial consumers in this State, whereas the plaintiff is taxed at the rate of three and nine-tenths per cent upon the gross income which it receives for the gas which it supplies to its industrial consumers under special industrial contracts.

The tax provided by Section 2d is imposed only upon a person engaging or continuing within this State in any public service or utility business and the amount of the tax is computed on the gross income from such business. A nonutility supplier of gas by wholesale sales is not within but is excluded from the provision of Section 2d and is not subject to the tax imposed by that section. The plaintiff in supplying and furnishing gas at wholesale to its industrial consumers under special industrial contracts in its utility service territory is engaged in public service or utility business, and in making such sales it is supplying to its industrial consumers public service and is within the provisions of Section 2d as determined by this Court in its decision upon Issue No. 7. Nonutility suppliers of gas are in a different classification for tax purposes than that of the plaintiff as the supplier of public service and these different classifications are valid and are not violative of any provision of the Constitution of the United States or of the Constitution of West Virginia. Nonutility suppliers of gas are not subject to regulation by the Public Service Commission. They do not dedicate their facilities to and do not engage in public service within the meaning of the statutes relating to public utilities. Wilhite v. Public Service Commission of West Virginia, 150 W.Va. 747, 149 S.E.2d 273. In that case this Court held in point 2 of the syllabus that

"The Public Service Commission of West Virginia has no jurisdiction and no power or authority except as conferred on it by statute and necessary implications therefrom, and its power is confined to the regulation of public utilities. It has no inherent power or authority."; in point 3 of the syllabus that "The test as to whether or not a person, firm or corporation is a public utility is that to be such there must be a dedication or holding out either express or implied that such person, firm, or corporation is engaged in the business of supplying his or its product or services to the public as a class or any part thereof as distinguished from the serving of only particular individuals; and to apply this test the law looks at what is being done, not to what the utility or person says it is doing."; and in point 4 of the syllabus that "The mere fact that a product which is usually dispensed by or sold by a utility to the public is being furnished does not make every person, firm, or corporation selling such product a public utility. If such product is sold under private contract and the seller does not hold himself out to sell such product to the public or render some service to the public he is not a public utility."

The law confers certain privileges and imposes certain duties upon a public utility which are distinct from those conferred or imposed by law upon a nonutility. The paramount duty of a public utility is to serve all the public within its utility service territory; a nonutility is subject to no such duty. A public utility enjoys protection from competition within its field, is entitled to a fair return upon its investment used and useful in its public service business, and possesses the right of eminent domain. No such advantages are enjoyed by a nonutility. The differences in the rights and duties of a public utility and a

nonutility justify the separate classification in which each is included. In Arslain v. Alderson, 126 W.Va. 880, 30 S.E.2d 583, this Court used this language: "Unless the power of the Legislature over a subject matter is negatived by the Constitution, the Legislature has plenary power. * * *. We know of no provision of the Constitution which requires that the same rate be applied to all classes of business and callings on which privilege taxes are assessed. The Legislature may prescribe rates for different businesses and callings, but the rate of taxation must be uniform and equal within the classification and, if so, we see no constitutional objection thereto." In Appalachian Electric Power Company v. Koontz, 138 W.Va. 84, 76 S.E.2d 863, this Court said that "taxes need be equal and uniform only as to the same class of business,". This Court has also said in Clarksburg Light and Heat Company v. Public Service Commission of West Virginia, 84 W. Va. 638, 100 S.E. 551, that when a utility is engaged in supplying gas to the public "it cannot supply a part of that public under private contract, and a part of it under public regulation."

It is well established that a state by its legislature may make reasonable classifications in enacting statutes provided the classifications are based on some real and substantial relation to the objects sought to be accomplished by the legislation, and a person who assails any such classification has the burden of showing that it is essentially arbitrary and unreasonable. State ex rel. Heck's, Inc. v. Gates, 149 W.Va. 421, 141 S.E.2d 369. In that case this Court in the opinion used this pertinent language: "The necessity for and the reasonableness of a classification are primarily questions for the legislature and if any state of facts can be reasonably conceived to

support the classification such state of facts at the time of the enactment of a statute must be assumed. The presumption is that the classification is reasonable and appropriate and that the act is constitutional unless illegality appears on its face. Mandell v. Haddon, 202 Va. 979, 121 S.E.2d 516. The Equal Protection Clause of the Fourteenth Amendment does not deprive the States of the authority to make a reasonable classification in enacting statutes under the police power, provided the classification is based on some real and substantial relation to the objects sought to be accomplished by the legislation, and a person who assails the classification has the burden of showing that it is essentially arbitrary and unreasonable. Mandell v. Haddon, 202 Va. 979, 121 S.E.2d 516; Martin's Ex'rs. v. Commonwealth, 126 Va. 603, 102 S.E. 77; McGowen v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.E. 2d 393; Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536; Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563; Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not preclude the resort to classification for the purpose of legislation if the classification is reasonable, is based on pertinent and real differences, and has as its object a purpose germane to the legislation. Tweel v. West Virginia Racing Commission, 138 W.Va. 531, 76 S.E.2d 874, appeal dismissed, 346 U.S. 869, 74 S.Ct. 123, 98 L.Ed. 379."

Wholesale sales of natural gas by a public utility to industrial consumers within its utility service territory under special industrial contracts constitute the supplying of public service within the meaning of Section 2d,

Article 13, Chapter 11, Code 1931, as amended, and the taxation of such sales at a higher rate than is imposed by Section 2c of the same article and chapter upon an unregulated nonutility which makes the same kind of wholesale sales to industrial consumers is not violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States or of Article X, Section 1 of the Constitution of West Virginia.

Issue No. 9 involves the effect of the tax commissioner's Regulation BOT-32 on the wholesale sales of gas by the plaintiff to its industrial consumers under special industrial contracts, dealt with in Issue No. 7, which sales this Court in resolving Issue No. 7, has held to constitute the supplying of public services within the meaning of Section 2d, Article 13, Chapter 11, Code 1931, as amended; and that issue is stated in this language: "Do the Equal Protection Clause of the 14th Amendment to the United States Constitution and Section 1, Article X of the West Virginia Constitution prohibit the higher rate of Tax Section 2d from being applied to United Fuel's gross income from such special contract industrial sales of gas made in its West Virginia service territory, in view of the fact that Regulation BOT-32, one of the official Regulations promulgated to aid in the administration of the Business and Occupation Tax, properly recognizes that a gas utility company can make (i) 'non-utility sales' of produced gas taxable only under Tax Section 2a, and (ii) 'non-utility sales' of purchased gas taxable only under Tax Section 2c, under which said Regulation BOT-32 the Tax Commissioner admits any or all of United Fuel's special contract industrial sales would be 'non-utility sales' of gas if they were made in West Virginia but outside the company's utility service territory." The plaintiff asserts that the tax commis-

sioner has interpreted Regulation BOT-32 so as to distinguish between special contract industrial sales within and without the utility service territory of the plaintiff and to classify such sales by a utility outside its utility service territory as nonutility sales; that there is nothing in law or logic which justifies such interpretation; and that such interpretation is violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and Section 1, Article X of the Constitution of West Virginia. The regulation in question provides that persons engaged in the business of selling gas as a utility are liable for the taxes levied under Section 2d of the statute and that utilities in the business of making nonutility sales of tangible property shall report the gross income of such sales under Item C-1, retail classification, or Item C-2, wholesale classification, depending on whether the sales are retail or wholesale. Though the regulation by implication recognizes and permits nonutility sales, nowhere does it expressly or by necessary implication provide that the sale of gas by a utility outside its utility service territory is a nonutility sale. As all of the wholesale sales of gas by the plaintiff to its industrial consumers under the special industrial contracts involved in Issue No. 7 were consummated in the utility service territory of the plaintiff and as none of such sales or any other sale involved in this proceeding was made outside its utility service territory, the question of the ill effects of such sale outside such utility service territory as a result of the interpretation of the regulation by the tax commissioner, of which the plaintiff complains, is not an issue for determination in this case; and for that reason that question is not considered or decided on this appeal.

The circuit court, in considering Issue No. 9, decided

that issue adversely to the plaintiff. The sales of gas by the plaintiff to its industrial consumers under the special industrial contracts involved in Issue No. 7 having been herein determined to be the supplying of public service by a utility and not to be nonutility sales, the action of the circuit court in deciding Issue No. 9 adversely to the contention of the plaintiff will not be disturbed on this appeal.

Issue No. 10 relates to three special industrial contracts for the sale and delivery of gas through the transmission pipelines of the plaintiff to E. I. duPont de Nemours and Company at its plant at or near Belle in Kanawha County, to Elk Refining Company at its refinery at or near Falling Rock in Kanawha County, and to Kaiser Aluminum and Chemical Corporation at its plant near Ravenswood in Jackson County. Each of these contracts between the plaintiff and each company covers a long period of time and calls for the continuous delivery of large minimum supplies of gas. The issue presents the question whether the gas involved is transported in interstate commerce and whether the income derived from its sale is taxable or is excluded from taxation under Section 2d, Article 13, Chapter 11, Code, 1931, as amended.

The gas involved in this issue, which consists entirely or almost entirely of gas produced in Louisiana and Texas, referred to as southwestern gas, and in Kentucky and Virginia and obtained by the plaintiff from Tennessee Gas Transmission Company or from Columbia Gulf Transmission Company and transported by large transmission lines for sale and delivery by the plaintiff to its special industrial consumers at the plant of each company, is transported in high pressure transmission lines

directly in a continuous stream to such plants, except during the months of May through October when it is temporarily placed in underground storage and transported as needed in a continuous stream from such storage to such plants during the months of January through April and November and December. The flow and the delivery of the gas to the plant are continuous and without interruption whether the gas is furnished without passing through storage or is withdrawn from storage for delivery to the plants. The purpose and effect of such storage are to make available, at all times, the supply required by the industrial contract consumers.

The sales of gas to E. I. duPont de Nemours and Company, sometimes referred to as duPont, began late in 1956 after the execution of the special industrial sales agreement dated November 8, 1956 and after the Federal Power Company issued a Certificate of Public Convenience and Necessity which authorized the plaintiff to build and operate facilities consisting, in part, of 17.7 miles of 12¾ inch pipeline, capable of delivering a maximum of 35,000 Mcf per day. Plaintiff's long term arrangements with Tennessee Gas Transmission Company and the gas acquisition program of that company with its southwestern lessors and independent producers were all based, in part, on plaintiff's contractual obligation to meet duPont's gas requirements at its Belle, West Virginia, plant. The gas delivered to duPont was 100% southwestern gas purchased by the plaintiff from Tennessee Gas Transmission Company in Kanawha County and then transported southerly by the plaintiff to the Kanawha County point of delivery to duPont by the transmission lines of the plaintiff. In the summer period the gas flowed continuously from the various producing wells in Louisiana and Texas to duPont's main line tap

near the end of the transmission line in Belle without injection into or withdrawal from any underground storage field, and the gas delivered to duPont in the winter period was the same Louisiana and Texas gas which was stored during the summer periods in a storage field about five miles northeast of Belle. In the winter periods the gas was withdrawn from the storage field as required by duPont. The gas is used in the manufacture of various products. After the gas is delivered it is converted into ammonia within a few minutes and the gas used in the manufacture of other products is converted into such products within a one day period. The contract between the plaintiff and duPont required the plaintiff to sell and deliver and duPont to purchase natural gas for processing purposes at its plant in an amount not to exceed, without the plaintiff's prior permission, 31,000 Mcf per day; provided a minimum bill for each billing month in the amount of $100,000.00 for gas delivered, except that from the beginning of the contract until April 30, 1959, the minimum monthly billing should be in the amount of 50% of the minimum of $100,000.00; provided that the aggregate purchase price for the gas produced in Texas, Louisiana and neighboring states should be the unit cost of southwestern gas subject to certain adjustments; fixed the term of the contract at twenty years, subject to termination by duPont after the end of the first ten year period; stated that the greater part of plaintiff's gas supply originates in the southwest; fixed the delivery point of the gas at the outlet side of the plaintiff's metering and regulating installation located at the plant; and required delivery of the gas at a pressure of 550 pounds.

The sales of gas to Elk Refining Company, sometimes referred to as Elk, began as early as 1938 and before the enactment of the National Gas Act, but the operation

by the plaintiff of the necessary facilities has been under a certificate from the Federal Power Commission for all preexisting jurisdictional facilities. The present contract between the plaintiff and Elk was entered into on September 1, 1957. The normal flow of the gas to Elk for the summer period of 1961 was 117,168 Mcf and consisted of 100% West Virginia produced gas but the winter period deliveries to Elk consisted of 187,106 Mcf, 87% of which was southwestern gas from storage, 3% Kentucky gas from storage and 10% West Virginia gas. For the years 1957 and 1958 all the storage gas furnished Elk was 100% southwestern gas. For the summer periods and for the winter periods the deliveries are estimated to have been 92% southwestern gas withdrawn from underground storage and 8% West Virginia pipeline gas. By the contract with Elk the plaintiff agreed to sell and deliver and Elk agreed to purchase and receive natural gas for use in its refinery at or near Falling Rock, West Virginia, in quantities up to 2500 Mcf of gas per day. The contract provided a minimum charge of $1500.00 per month for each billing month for gas delivered; provided that the aggregate purchase price for the gas produced in Texas and Louisiana and neighboring states should be the unit cost of southwestern gas subject to certain adjustments; fixed the term of the contract at one year from September 1957 and thereafter from year to year until terminated by written notice by either party; stated that the greater part of plaintiff's gas supply originated in the southwest; fixed the delivery point of the gas at the outlet side of the plaintiff's measuring station located on the premises of Elk at Falling Rock, West Virginia; and required deliveries of the gas at pressures prevailing from time to time in the lines from which the deliveries are made.

The sales of gas to Kaiser Aluminum and Chemical Corporation, sometimes referred to as Kaiser, began after the execution of the special industrial sales agreement dated October 1, 1957 and after the Federal Power Company issued a Certificate of Public Convenience and Necessity which authorized the plaintiff to build and operate facilities, consisting, in part, of six miles of 10 inch transmission pipeline capable of delivering a maximum of 5500 Mcf per day which maximum, by subsequent contract dated October 1, 1957, was increased to 13,000 Mcf per day and was authorized by the Federal Power Commission. Plaintiff's long time southwestern gas supply contract was based, in part, on its obligation to furnish gas to Kaiser. Before and through the year 1958 all the gas delivered to Kaiser was 100% southwestern gas received by the plaintiff from Columbia Gulf Transmission Company in Boyd County, Kentucky, or purchased from Tennessee Gas Transmission Company at delivery points in Wayne County, West Virginia, and then transported by transmission lines of the plaintiff easterly and northerly to the point of delivery to Kaiser in Jackson County, West Virginia. In the summer periods the gas flows continuously from the various producing southwest wells to Kaiser at the main line tap about five miles southwest of Ravenswood, without injection into or withdrawal from any underground storage fields, and the gas delivered in the winter periods was stored for the summer periods from the same southwestern supply in an underground field about ten miles northeast of Ravenswood. In the winter periods the gas was withdrawn from the storage field as required by Kaiser. Since the year 1958 the gas sold to Kaiser consisted wholly or almost wholly of southwestern gas, and deliveries were made in the same manner as the gas deliveries prior to and during

that year. The special industrial contract between the plaintiff and Kaiser required the plaintiff to sell and deliver and Kaiser to purchase natural gas for processing purposes at its plant at Ravenswood, West Virginia, in an amount not to exceed 13,000 Mcf per day; provided a minimum bill for each billing month in the amount of $15,000.00 until January 1, 1958, $20,000.00 until October 1, 1958, and $40,000.00 after October 1, 1958; provided that the aggregate purchase price for the gas produced in Texas, Louisiana and neighboring states should be the unit cost of southwestern gas subject to certain adjustments; fixed the term of the contract at twelve years and thereafter from year to year, subject to termination by either party after written notice, with the right in Kaiser to terminate the agreement at the end of the first three year period or at any time thereafter upon written notice to the plaintiff and the payment to it of the sum of $170,000.00, representing the portion of the cost of the plaintiff of the construction of the 10 inch line extension to the Ravenswood plant, subject to certain credits; stated that the greater part of plaintiff's gas supply originated in the southwest; fixed the delivery point of the gas at the outlet side of the plaintiff's measuring station located on the premises of Kaiser; and required delivery of the gas at such pressures as would reasonably be required by Kaiser.

The defendant contends that the sales under these special industrial contracts were not transactions in interstate commerce but he also states in his brief that even though such transactions should be "technically considered to be interstate commerce," they were not so connected with interstate commerce that taxation under Section 2d would impose an unconstitutional burden on

such commerce; and that even assuming that such sales were transactions in interstate commerce they were taxable under Section 2d because the tax did not constitute an unreasonable burden on interstate commerce. On the contrary the plaintiff insists that the sales under the three special industrial contracts were sales in interstate commerce and that, as such, they were excluded by the provisions of Section 2d from the tax provided by that section.

The circuit court found that the sales under the three special industrial contracts with duPont, Elk and Kaiser were sales in interstate commerce; that Section 2d of the statute must be literally applied to exclude from the computation of the taxes not only sales in interstate commerce which would, if taxed, constitute an unreasonable burden on such commerce under the Constitution, but also to exclude all gross income from any transactions in interstate commerce; and, by so holding, ruled in favor of the plaintiff on Issue No. 10.

The finding of the trial court upon the undisputed facts that the sales of the imported gas to duPont, Elk and Kaiser, under the special contracts, is entitled to weight in the consideration of that issue. "The finding of a trial court upon facts submitted to it in lieu of a jury will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding." Point 6, syllabus, Daugherty v. Ellis, 142 W.Va. 340, 97 S.E.2d 33. See also The State Road Commission of West Virginia v. Oakes, 150 W. Va. 709, 149 S.E.2d 293, and the many cases cited in the opinion in that case.

The conclusion of the writer of this opinion is to affirm the judgment of the circuit court on Issue No. 10 and

it is supported by the immediately following reasons and citations of authority. That conclusion, however, is not concurred in by the majority of this Court whose ruling is to reverse on that issue and the opposite conclusion of the majority is set forth in the later paragraph of this opinion in which Issue No. 10 is dealt with and determined.

It is well established by numerous decisions of the Supreme Court of the United States that transportation of natural gas from one state to another for sale and consumption in the state where the transportation ends is interstate commerce. The Pipe Line Cases, 234 U.S. 548, 34 S.Ct. 956, 58 L.Ed. 1459; Pennsylvania Gas Company v. Public Service Commission, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; United Fuel Gas Company v. Hallanan, 257 U.S. 277, 42 S.Ct. 105, 66 L.Ed. 234; Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117, 32 A.L.R. 300; Missouri ex rel. Barrett v. Kansas Natural Gas Company, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027; East Ohio Gas Company v. Tax Commission of Ohio, 283 U.S. 465, 51 S.Ct. 494, 75 L. Ed. 1171; State Tax Commission of Mississippi v. Interstate Natural Gas Company, Inc., 284 U.S. 41, 52 S.Ct. 62, 76 L.Ed. 156; Illinois Natural Gas Company v. Central Illinois Public Service Company, 314 U.S. 498, 62 S.Ct. 384; 86 L.Ed. 371; Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 332 U.S. 507, 68 S.Ct. 190, 92 L.Ed. 128; Memphis Natural Gas Company v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832; Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993. In the first cited *Panhandle Eastern Pipe Line Company* case the court, considering the scope of the Natural Gas Act of Congress, held that it did not

prevent the state from regulating certain interstate sales of gas which were not covered by the Act but also held that the sales involved in that case of imported natural gas by an interstate pipeline carrier direct to industrial consumers were sales in interstate commerce. In the other cited *Panhandle Eastern Pipe Line Company* case, the gas company, which was engaged in the transportation of natural gas by pipeline from other states into Michigan and which was subject to regulation by the Federal Power Commission under the Natural Gas Act, sought to make direct sales of natural gas to large industrial consumers in Michigan. An order of the Michigan Public Service Commission required appellant to obtain from that commission a Certificate of Public Convenience and Necessity before selling natural gas direct to its industrial consumers in the Detroit area. In a proceeding to enjoin the enforcement of the order of the commission, the Supreme Court of the United States held that the direct sale to industrial consumers by the gas company of gas transported by it from other states into Michigan was clearly interstate commerce and that as the Natural Gas Act applied only to sales of gas in interstate commerce that were for resale and did not apply to interstate sales made direct to consumers the Natural Gas Act left such direct sales to state regulation. The decision in these two *Panhandle Eastern Pipe Line Company* cases establishes the proposition that the direct sales of gas imported from another state to industrial consumers is interstate commerce, and the recognition of the regulatory power of a state over such sale, because they are not covered by the Natural Gas Act, is not material to the issue here involved for the reason that if such sales are interstate commerce they are within the scope of the

exclusionary provision of Section 2d with respect to taxation of such sales.

In Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 332 U.S. 507, 68 S.St. 190, 92 L.Ed. 128, the plaintiff transported natural gas from Texas and Kansas fields into and across intervening states, including Indiana, to Ohio and Michigan. In Indiana Panhandle sold large amounts of its imported gas direct to large industrial consumers, one of which was Anchor-Hocking Glass Company and another was duPont in that state. It intended to transport and deliver such imported gas directly to such large industrial consumers. Headnote 1 to that case states that "Sales of imported natural gas by an interstate pipeline carrier direct to industrial consumers are sales in interstate commerce, even though the gas leaves the main transmission line within the state and is piped to the consumers through branch lines or laterals at reduced pressure." In the opinion, with reference to such sales to industrial consumers, the court said "Nor do we question that these sales are interstate transactions." The court also used this language "Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressures are not the criterion of the states' regulatory powers under the commerce clause. Cf. Interstate Natural Gas Co. v. Federal Power Comm'n, 331 U.S. 682, 689, [67 S.Ct. 1482, 91 L.Ed. 1742]. The sales here were clearly in interstate commerce."

In East Ohio Gas Company v. Tax Commission of Ohio,

283 U.S. 465, 51 S.Ct. 499, 75 L.Ed. 1171, the court held that the transportation of natural gas from wells outside of a state by the pipelines of producing companies to the state line, and thence, by means of the distributing company's high pressure transmission lines to their connections with its local systems is essentially national in character and is interstate commerce within and without the state; and that transfer of the title to or the custody of the gas while it is en route from state to state is not determinative of the question where interstate commerce ends. In the opinion the court used this pertinent language:

"It is elementary that a State can neither lay a tax on the act engaging in interstate commerce nor on gross receipts therefrom. Pullman Co. v. Richardson, 261 U.S. 330, 338, [43 St.Ct. 336, 67 L.Ed. 682]. New Jersey Bell Tel. Co. v. Tax Board, 280 U.S. 338, 346, [50 S.Ct. 111, 74 L.Ed. 463]. And while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. Sprout v. City of South Bend, 277 U.S. 163, 170-171, [48 S.Ct. 502, 72 L.Ed. 833] and cases cited.

"The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is

essential by national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends. Public Utilities Comm. for State of Kansas v. Landon, 249 U.S. 236, 239, 245, [39 S.Ct. 268, 63 L.Ed. 577], Missouri ex rel. Barrett v. Kansas Gas Co., 265 U.S. 298, 307-309, [44 S.Ct. 544, 68 L.Ed. 1027], Peoples Gas Co. v. Pub. Serv. Comm., 270 U.S. 550, 554, [46 S.Ct. 371, 70 L.Ed. 726], Pub. Util. Comm. v. Attleboro Co., 273 U.S. 83, 89, [47 S.Ct. 294, 71 L.Ed. 549]."

In Illinois Natural Gas Company v. Central Illinois Public Service Company, 314 U.S. 498, 62 S.Ct. 384, 86 L.Ed. 371, the court said: "That appellant and Panhandle Eastern are engaged in interstate commerce in the purchase and sale of the natural gas which moves in a continuous stream from points without the state into appellant's pipes within the state seems not to be open to question. Missouri ex rel. Barrett v. Kansas Gas Co., 265 U.S. 298, [44 S.Ct. 544, 68 L.Ed. 1027]; Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, [45 S.Ct. 184, 69 L.Ed. 439]; Peoples Gas Co. v. Public Service Commission, 270 U.S. 550, [46 S.Ct. 371, 70 L.Ed. 726]; State Tax Commission of Mississippi v. Interstate Natural Gas Co., 284 U.S. 41, [52 S.Ct. 62, 76 L.Ed. 156]. Pursuant to the mutual agreement of the two companies, the gas is transported in continuous movement through the pipe line into the state and through the appellant's pipes to the service lines of the distributors, where appellant delivers it to them. In such a transaction the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the intended destina-

tion, does not affect the essential interstate nature of the business. See Peoples Gas Co. v. Public Service Commission, supra, 554, [46 S.Ct. 371]; Pennsylvania v. West Virginia, 262 U.S. 553, 587, [43 S.Ct. 658, 67 L.Ed. 1117]; United Fuel Gas Co. v. Hallanan, 257 U.S. 277, 280-281, [42 S.Ct. 105, 66 L.Ed. 234]."

Whether the title to or the custody of the imported gas sold by the plaintiff to its industrial consumers, duPont, Elk and Kaiser, passed to the plaintiff when it entered its pipeline or to its industrial purchasers from the plaintiff, at or before, or after its delivery to them at their plants, is immaterial and did not in any wise affect, alter or terminate the interstate transportation of the gas in a continuous stream from points outside this State to the place of delivery within this State. See The Pipe Line Cases, 234 U.S. 548, 34 S.Ct. 956, 58 L.Ed. 1459; East Ohio Gas Company v. Tax Commission of Ohio, 283 U.S. 465, 51 S.Ct. 499, 75 L.Ed. 1171; Illinois Natural Gas Company v. Central Illinois Public Service Company, 314 U.S. 498, 62 S.Ct. 384, 86 L.Ed. 371.

Here there was no intrastate transportation after the interstate journey ended at the plants of duPont, Elk and Kaiser where the gas was used or consumed. In this respect the transportation of the gas which ended at those plants differed from the transportation of the product involved in the case of Gambino v. Jackson, 150 W.Va. 305, 145 S.E.2d 124, and in some cases cited by the defendant, in that in those cases there was intrastate transportation of the gas or other product to the consumer after the interstate journey had ended. Of course, in that situation the new local transportation was an intrastate transaction and as such was subject to taxation by the State. Here the transportation of the

gas was intended to end, and it did, at each plant which was the journey's end.

In the *Gambino* case one of the questions involved was whether railroad shipment of a car of agricultural lime from Basic Lime Company, a lime sales company located near Cleveland, Ohio, to the railroad station at Pennsboro, in Ritchie County, West Virginia, for the defendant, the purchaser, and the transportation of portions of the lime by the defendant by truck from the railroad station to various local farmers who had ordered lime from the defendant, was an interstate journey from the point of origin in Ohio to the point of delivery to the various purchasers of the lime from the defendant, or whether the interstate character of the transportation ended at the railroad station. On that question this Court held that the interstate transportation began in Ohio and ended at the railroad station, which was the point at which the parties intended that the movement of the carload of lime consigned to the defendant should finally end and that the delivery by truck by the defendant from the railroad station to the purchasers of the lime from him was intrastate commerce. In point 2 of the syllabus this Court said that interstate commerce continues as such until the goods shipped therein reach the point where the parties originally intended that the movement should finally end and that the further local movement by the consignee of the goods in furtherance of a valid business conducted by him constitutes intrastate commerce. The opinion in the *Gambino* case contains these pertinent statements:

"Here there was no intent that the lime was to be transported from Basic Lime Company to the ultimate consumer. As heretofore noted, Basic Lime had no knowledge of whom the ultimate consumer would be. The

final destination of the lime from Basic Lime Company was the depot at Pennsboro, where it was consigned to Jackson. That being so, there was no stoppage from its origin to its intended distination.

"* * *. 'In order for local transportation of goods to constitute interstate or foreign commerce, there must be such continuity of movement as to show that shipment to the ultimate destination was within the original contemplation of the shipper and that stoppage or change of carriers is merely incidental to the shipment. Mere uninterrupted movement of goods will not necessarily constitute the local transportation a part of an interstate or foreign shipment; in order to make the local carriage interstate or foreign commerce, it must be shown that the shipper, when he made the original shipment, intended or had within his contemplation transportation to a point outside the state if the local transportation preceded the interstate or foreign traffic or, if it succeeded it, to the final local destination.'

"Further demonstrating this point is the following language: 'Interstate commerce ordinarily continues as such until it reaches the point where the parties originally intended that the movement should finally end.' 15 Am.Jur.2d, Commerce, § 59. See also Binderup v. Pathe Exchange, 263 U.S. 291, 68 L.Ed. 308, 44 S.Ct. 96; Southern Pac. Co. v. State of Arizona, 249 U.S. 472, 63 L.Ed. 713, 30 S.Ct. 313; Western Union Telegraph Company, et al. v. Foster, 247 U.S. 105, 62 L.Ed. 1006, 38 S.Ct. 438, 1 A.L.R. 1278; Pittsburgh and Southern Coal Company v. Bates, 156 U.S. 577, 39 L.Ed. 538, 15 S.Ct. 415; Danciger v. Cooley, 248 U.S. 319, 63 L.Ed. 266, 39 S.Ct. 119; Rosenberger v. Pacific Express Company, 241 U.S. 48, 60 L.Ed. 880, 36 S.Ct. 510; and United

States v. Freeman, 239 U.S. 117, 60 L.Ed. 172, 36 S.Ct. 32."

In this proceeding it is clear that transportation of the southwestern gas from points in Louisiana and Texas continued in unbroken flow into Kentucky or West Virginia in the transmission lines of the plaintiff direct to its intended destination at the plants of duPont, Elk and Kaiser where it was delivered and consumed by those industrial consumers, except for temporary storage of portions of the gas which, as previously indicated, did not alter or terminate the direct transportation of the gas to its intended final destination. This continuous journey of the gas, from its points of origin outside this State to its intended final destination at the plants of duPont, Elk and Kaiser in this State in substance duplicates the interstate transportation of the carload of lime in the *Gambino* case to its intended final destination at the railroad station at Pennsboro and, like the shipment in the *Gambino* case, the foregoing transportation of the gas constituted interstate commerce.

It is reasonably clear from the record, and it is not disputed, that the plaintiff purchased the southwestern gas for the express purpose of furnishing it to duPont, Elk and Kaiser, and that it was the intention of the plaintiff and duPont, Elk and Kaiser, the industrial purchasers, that the gas should be transported direct, as it was, from points outside West Virginia to the plants of duPont, Elk and Kaiser in this State. The transportation of the gas in each instance, which originated outside this State, was intended by the plaintiff and the seller to it of such gas to continue in uninterrupted movement to each of the special industrial contract consumers at its plant and such gas was, in fact, transported in a continuous stream to its intended destination.

The temporary storage of that portion of the gas that passed through underground fields on its way to the plants did not terminate or change its interstate journey. The temporary storage of the gas in an underground field for withdrawal and transportation to its intended destination resembles the temporary layover of a Pullman car or freight car in a railroad yard or station for transfer to another carrier to complete the intended interstate journey and such temporary delay or slight deviation does not change the character of the interstate transportation. Certainly it could not be successfully contended that a Pullman passenger car from Charleston to New York is not engaged in an interstate journey after the Pullman car is disconnected from the Chesapeake and Ohio train in the Washington terminal and after a temporary delay is connected to a Pennsylvania railroad train and by it is transported to the intended destination at the railroad station in New York.

In Standard Oil Company v. Federal Trade Commission, 340 U.S. 231, 71 S.Ct. 240, 95 L.Ed. 239, the petitioner obtained gasoline from fields in Kansas, Oklahoma, Texas and Wyoming, refined it in Indiana, and distributed it in fourteen middle western states. The gasoline sold by it in the Detroit area was transported by carrier tankers on the Great Lakes from Indiana to petitioner's marine terminal at River Rouge, Michigan. Enough of the gasoline was accumulated there during each navigation season to make a winter supply available from the terminal. The gasoline remained there or in nearby bulk storage stations for varying periods. While there the gasoline was owned by the petitioner and was en route from its refinery in Indiana to its market in

Michigan. Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the demands of petitioner's customers could be estimated accurately. The gasoline sold to customers in Detroit was taken from the gasoline stored at the terminal. The Supreme Court of the United States held that sales of such gasoline were interstate commerce and that they were not deprived of their interstate character by the temporary storage of the gasoline in the Detroit area.

In Railroad Commission of Ohio v. Worthington, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed 1004, lake-cargo coal, destined for delivery to points in the northwest, was transported by railroad from the No. 8 Coal Field in eastern Ohio to the lake ports of Huron and Cleveland, Ohio, on Lake Erie for carriage from those points to the northwest by lake vessels. At those lake ports were dock facilities and machinery and appliances for unloading coal into vessels during the season of navigation. The operator of the dock facilities notified the railroad company that at a certain time a vessel would be at the port to load a given number of tons of coal. The railroad then picked up such cars of coal as were necessary to fill the cargo, moved them on the dock beside the vessel, and loaded the vessel with the coal and furnished the shipper with a cargo statement showing the car number and weight, and the total number of tons of coal in the vessel. The court held that such transportation of the coal was interstate commerce. See Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 33 A.L.R. 229; Walling v. Jacksonville Paper Company, 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460; Wilcox v. Illinois Commerce Commission, 23 Ill.2d 432, 178

N.E.2d 873, 42 P.U.R. 3d 231; West Virginia Pipe Line Company v. State, 95 W.Va. 285, 120 S.E. 759.

In the *West Virginia Pipe Line Company* case this Court held in point 1 of the syllabus that "Oil purchased at producers' stock tanks in this state by a pipe line company, and in transit through its pipe line system to purchasers in another state, is in interstate commerce and therefore not legally subject to personal property tax in this state."; and in point 2 of the syllabus that "This is true, though as incidental to such commerce, quantities of the oil accumulated temporarily in collecting tanks which are part of the pipe line system." In the opinion this Court, in discussing the status of oil temporarily stored in the stock tanks of the producer to be pumped out of this state in its pipe line system, used this language: "The tanks serve only to aid in that transportation, and while the oil at times accumulates, such accumulations are but temporary and incidental. It is not unlike the congestion of logs in a stream in transit to another state, when impeded by flood conditions. The logs are in interstate commerce and are not subject to tax in the state where they are temporarily held. Champlain Realty Company v. Town of Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195. * * *. If the oil is in interstate commerce at all, its temporary storage in the tanks is not material, * * *."

Though the defendant makes formal denial that the transportation of the imported southwestern gas to duPont, Elk and Kaiser is in interstate commerce, he seeks to sustain the levy of the tax upon the gross income from the sale of such gas on the ground that the transportation of such gas, even if interstate commerce, is subject to the tax imposed because the tax does not con-

stitute an unreasonable burden on interstate commerce. Numerous cases cited and relied on by the defendant sustain a tax on interstate commerce if such tax does not operate as a burden on interstate commerce but is merely an incident to such commerce. See General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1554, 12 L.Ed.2d 430, rehearing denied, 379 U.S. 875, 85 S.Ct. 14, 13 L.Ed.2d 79; Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 332 U.S. 507, 8 S.Ct. 190, 92 L.Ed. 128; McGoldrick v. Berwind-White Coal Mining Company, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; Southern Natural Gas Corporation v. Alabama, 301 U.S. 148, 57 S.Ct. 696, 81 L.Ed. 970; Wiloil Corporation v. Pennsylvania, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838. In some of the cases cited and relied on by the defendant it was held that the transportation of gas from one state to another, as in the case at bar, was interstate commerce which could not be subjected to a state tax, but that when the gas was placed in the local distribution system and then sold at retail locally, the interstate journey had ended and that such sales were local or intrastate transactions which were taxable by the State. See Central Greyhound Lines, Inc. v. Meeley, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633; Southern Natural Gas Corporation v. Alabama, 301 U.S. 148, 57 S.Ct. 696, 81 L.Ed. 970; Public Utilities Commission for the State of Kansas v. Landon, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577. These cases are clearly distinguishable from the case at bar as the imported southwestern gas sold to duPont, Elk and Kaiser was delivered direct to the consumer at the end of the continuous interstate journey and was never placed in the local distribution system of the plaintiff. The argument based on the proposition that in such circumstances interstate com-

merce may be subjected to a valid state privilege tax is not pertinent to Issue No. 10. The question presented by that issue and here under consideration is not the validity of a state tax on interstate commerce in the absence of an exclusionary state statute which exempts such commerce from taxation but the validity of a tax on interstate commerce under a taxing statute of this State which provides that the measure of the tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. To say that the tax in question is valid because it does not burden but is merely incidental to interstate commerce is to ignore and not determine the question presented by Issue No. 10 which, of course, is whether, if the transportation under the cited cases is taxable interstate commerce, the income derived from such commerce is exempt from taxation by the exclusionary provision of Section 2d of the statute of this State. That exclusionary statutory provision is plain and free from ambiguity. Its meaning is clear and unmistakable and shows clearly that the Legislature, in enacting it, intended that no tax under the statute should be imposed on the gross income derived from interstate commerce. When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the court, and in such case it is the duty of the court not to construe but to apply the statute. State ex rel. Riffle v. City of Clarksburg, W.Va., 162 S.E.2d 181; In re Estate of Ressager v. Battle, W.Va., 161 S.E.2d 257; J.D. Moore, Inc. v. Hardesty, 147 W.Va. 611, 129 S.E.2d 722, and the numerous cases cited in the opinion in that case. As the transportation of the imported southwestern gas and its sale and delivery are transactions in interstate commerce and the income derived from inter-

state commerce is expressly excluded from taxation under Section 2d, Article 13, Chapter 11, Code, 1931, as amended, the action of the circuit court in reversing and annulling the tax levied on the sales of the imported southwestern gas transported and delivered to duPont, Elk and Kaiser is, in my opinion, correct and proper. Of course, the gas produced and transported within this State and sold and furnished to Elk under the industrial sales contract between it and the plaintiff, not being a transaction in interstate commerce, is taxable by this State under the provisions of Section 2d.

The view hereinabove expressed with respect to Issue No. 10 and the approval of the ruling of the circuit court on that issue represent the opinion of the writer of this opinion who, as previously indicated, would affirm the action of the circuit court on that issue. With that view, however, Judges Browning, Calhoun and Caplan disagree. They are of the opinion that the transportation and delivery of the imported southwestern gas to duPont, Elk and Kaiser are not interstate commerce, that the sales of such gas are local or intrastate transactions, and that the income derived from those sales is subject to the taxation provided by Section 2d; and they would reverse the action of the circuit court on Issue No. 10 and uphold the action of the defendant in levying the tax of $776,-340.48. Accordingly, the majority of this Court holds that the transportation of southwestern gas produced from wells in Texas and Louisiana, purchased by a utility operating in this State, part of which gas is transferred to such utility in its high pressure transmission lines at a point in this State and the other part of which gas is transferred to such utility in its high pressure transmission lines at a point outside this State, and all of which gas is transported direct from such points, after tempo-

rary delay in some instances in underground storage fields, to the plant of the consumer in this State where it is used and consumed, is not a transaction in interstate commerce. The sale of such gas to such consumer constitutes a local or intrastate transaction, is taxable by this State, and is not excluded from taxation by Section 2d, Article 13, Chapter 11, Code, 1931, as amended, which provides that the measure of such tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries.

Issues Nos. 12 and 13 relate to the penalties imposed by the defendant in the amount of $353,786.02, which the circuit court set aside and vacated. Issue No. 12 presents the question whether the failure of the plaintiff to remit the proper amount of the tax was due to reasonable cause within the meaning of Section 11, Article 13, Chapter 11, 1931, as amended, which should have prompted the defendant to grant an unconditional waiver of such penalties instead of waiving them upon the condition that the plaintiff should pay the levied taxes within thirty days from the receipt of his ruling. Issue No. 13 presents the question whether the imposition of the penalties for failure of the plaintiff to remit the proper amount of the tax is prohibited by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article III, Section 10 of the Constitution of West Virginia. Inasmuch as the circuit court based its decision to vacate the penalties on Issue No. 12 and did not directly decide Issue No. 13, that issue will not be considered or determined on this appeal.

In resolving Issue No. 12, the circuit court held that consideration by the predecessors of the defendant of

many transactions similar to the transactions here under consideration which were not subjected to the same kind of taxes as the taxes here involved and the re-assessment by the defendant of the taxes originally levied against the plaintiff constituted reasonable cause for the defendant, in the exercise of the discretion vested in him, to waive the penalty for failure to remit the taxes assessed against the plaintiff, and that the imposition of the condition that the taxes be paid within thirty days upon which the waiver of the defendant was based, amounted to an abuse of discretion by the defendant.

Under the provisions of Section 11, Article 13, Chapter 11, Code, 1931, as amended, the tax commissioner is required to add specified penalties to the proper amount of the tax which a taxpayer fails to report, or fails to report and pay, but is authorized, if the failure is due to reasonable cause, to waive or remit such penalties. It is clear that a waiver of the penalty added for failure to pay the proper amount of the tax due by a taxpayer is in the sound discretion of the commissioner and that the exercise of such discretion is subject to judicial review.

It is evident, from the undisputed facts disclosed by the record, that the plaintiff, in failing to pay the tax levied by the commissioner and in challenging the correctness and the validity of the taxes upon some of the various activities of the plaintiff by its appeal from the re-assessment by the commissioner to the circuit court and in prosecuting this appeal, was at all times acting in good faith. It is also manifest that the validity of the presently levied taxes on some of the transactions engaged in by the plaintiff had been rendered uncertain by the different positions of some of the predecessors of the defendant from the present position of the defendant

as to the taxability of transactions which some of his predecessors failed to tax or did not consider taxable. Moreover, the action of the commissioner in reassessing the taxes in the present amount and in reducing the amount of the taxes as originally assessed; the granting of the waiver of the penalties upon the unreasonable condition that the presently levied taxes should be paid by the plaintiff within the specified period of thirty days, which was the identical period within which the plaintiff had the right to appeal the reassessment; the absence of any statutory right of the plaintiff to pay the tax under protest and obtain a refund if the assessment should be erroneous in part or in its entirety; and the complex and difficult legal questions with respect to the validity of the taxes involved in the present levy, when considered singly or together, establish beyond question reasonable cause for the failure of the plaintiff to return or remit the taxes here involved at the time they became due and payable and were sufficient to warrant the commissioner, in the proper exercise of his sound but judicially reviewable discretion, to waive penalties imposed for the failure of the plaintiff to return and remit the proper amount of the taxes. The refusal of the commissioner, in the circumstances disclosed by the record, to grant a waiver of the penalties, except upon the unreasonable condition of the payment of the re-assessment of the taxes within the designated period of thirty days, constituted a clear abuse of the discretion vested in him by the statute. Jewel Tea Company, Inc. v. State Tax Commissioner, 70 N.D. 229, 293 N.W. 386; In re Abbott's Estate, 213 Minn. 299, 6 N.W.2d 466.

In Walter Butler Building Company v. Soto, 142 W.Va. 616, 97 S.E.2d 275, this Court said: "In a declaratory judgment proceeding the taxpayer institutes a suit

against the State Tax Commissioner to determine the validity of an assessment of a tax against the taxpayer and his liability to pay the tax. In taking the appeal provided by Section 8 of the statute the taxpayer proceeds against the State Tax Commissioner in the manner prescribed by Sections 7b and 8. The object and the purpose of each proceeding are to enable the taxpayer to controvert and present his defense against a tax previously assessed against him by the State Tax Commissioner which if valid and not challenged in either proceeding will become final and render him liable for its payment. The identical issue to be determined in each proceeding is the validity of the assessment of the tax and the liability of the taxpayer to pay the tax." It is evident that upon an appeal from an assessment by the tax commissioner of a tax, in which the validity of the assessment and the liability of the taxpayer to pay the tax are involved, the Court, as an incident to the determination of those quesitons, has the power and the authority to set aside and vacate any penalties imposed by the tax commissioner in the event the assessment of the tax in whole or in part is held to be erroneous or the tax commissioner has abused his discretion in refusing, upon a showing by the taxpayer of reasonable cause, to waive any penalty added to the tax and assessed against such taxpayer. See State ex rel. Field v. United States Steel Corporation, 143 W.Va. 375, 102 S.E.2d 354. In that case, in which one judge, being disqualified, did not participate, the unanimous decision of the four participating judges affirmed the judgment of the circuit court in setting aside and vacating in its entirety the penalties imposed against the taxpayer by the tax commissioner. This Court holds that when, upon appeal, the taxpayer shows reasonable cause for his failure to return or to

pay the proper amount of the tax assessed against him and the tax commissioner refuses to waive any penalties imposed by him, the appellate court, in the exercise of its jurisdiction to hear and determine such appeal, may set aside and vacate any penalties imposed by the tax commissioner.

The action of the circuit court in upholding the tax levied and involved in Issues Nos. 4, 5, 6, 7, 8 and 9, is affirmed; but by reason of its erroneous action in refusing to render judgment for the defendant for the tax levied upon the unmeasured free gas produced by the plaintiff and furnished the lessors as required by the leases held by the plaintiff involved in Issue No. 1, and in refusing to render judgment for the defendant for the tax levied upon the gas sold and delivered by the plaintiff to duPont, Elk and Kaiser, involved in Issue No. 10, and because the judgment rendered by the circuit court for $92,249.23 is clearly insufficient in that it does not include all the tax which the defendant is entitled to recover, that judgment is reversed and set aside, and this proceeding is remanded to that court with directions that it render judgment in favor of the defendant and against the plaintiff for the full amount of the taxes levied against the plaintiff with interest from the date of such judgment and costs, and that the amount of all such taxes shall be determined in accordance with the principles enunciated in this opinion. But no penalty shall be assessed against the plaintiff and no judgment for any penalty shall be rendered against it in this proceeding.

Judge Berry, deeming himself disqualified, did not participate in the consideration or decision of this case.

Affirmed in part, reversed in part, remanded with directions.

PART TWO: THE OPINION BY CALHOUN, JUDGE*

UNITED FUEL GAS COMPANY, a corporation, v. G. THOMAS BATTLE, TAX COMMISSIONER OF WEST VIRGINIA—No. 12706

Calhoun, Judge, concurring:

I agree with the Court's decision in this case. The four judges who participated in the decision were in agreement on all questions presented for decision except, as the Court's opinion states, Judge Haymond was unable to agree with the three other judges in relation to Agreed Issue No. 10. He, as the author of the Court's opinion, has ample precedent among prior decisions of the Court for his having stated in the opinion the basis of his disagreement. Nevertheless, I deem it wise and proper to state more fully that which I conceive to be the position of the majority in relation to this portion of the decision.

Agreed Issue No. 10, formulated while the case was in the trial court, is as follows:

"Does Tax Section 2d in providing inter esse that 'the measure of this tax shall not include gross income derived from commerce between this state and other states of the United States' thereby exclude from taxation under any Tax Section of the statute United Fuel's gross income from sales of gas under special industrial contracts directly from United Fuel's transmission pipelines to—

(a) E. I. du Pont de Nemours and Company

(b) Elk Refining Company, and

* This is the majority opinion on the questions raised by this appeal. It has not been officially reported, but it is unofficially reported in 167 S.E. 2d 920-25.

(c) Kaiser Aluminum & Chemical Corporation

—in view of the particular facts, including the r
of underground storage, involved in the sales and de
ries to each?"

By the brief filed in behalf of United Fuel Gas Co
pany (which hereafter in this opinion may be refer
to as United Fuel) and by the amici curiae brief,
well as by oral argument of counsel by whom such bri
were filed, it has been vigorously urged that the sti
lated issue in question is not concerned with the qu
tion whether the tax involves the Commerce Cla
of Article I, Section 8 of the Constitution of the Unit
States. Indeed, counsel, by brief and oral argume
have displayed a degree of impatience with the acti
of counsel for the defendant in asserting that impositi
of the tax here in question is not in violation of t
Commerce Clause.

The Court's opinion makes clear that Agreed Is
No. 10, does not involve the constitutional question, b
that it involves only the validity of the tax when consid
ed in relation to the provisions of Code, 1931, 11-13-
as amended, a statute which provides for payment
a tax, commonly referred to as a Business and Occ
pation Tax, "Upon any person engaging or continui
within this State in any public service or utility bu
ness, * * *" (Italics supplied.) The language rel
upon by United Fuel is a sentence included in t
statute which, so far as pertinent, is as follows: "T
measure of this tax shall not include gross income d
rived from commerce between this State and other stat
of the United States * * *." (Italics supplied.)

Notwithstanding the narrow character of the que
tion presented for decision by the language of Agree

Issue No. 10, the trial court, in its written opinion, held that the tax was in violation of the statutory provision and also that, under the decision in State ex rel. Battle v. Baltimore and Ohio Railroad Company, 149 W.Va. 810, 143 S.E.2d 331, "the statute must be literally applied to exclude from the computation of the taxes, not only sales in interstate commerce which would, if taxed, clearly constitute an unreasonable burden thereon under the Constitution, but all gross income from any transaction in interstate commerce." I am of the opinion, as apparently was the trial court, that if it were held that the tax here in question represents a tax upon gross income derived from interstate commerce under the statute, it might with some reason be argued that, under the Baltimore and Ohio Railroad Company case, the tax is, as a matter of course, violative of the Commerce Clause. Nevertheless, the counsel for the taxpayers earnestly urge that the tax is in contravention of the statutory provision and yet strenuously insist that, in considering the validity of the tax, the Commerce Clause is not material in any sense or degree.

In relation to Agreed Issue No. 10, it is stated in the Court's opinion that the "finding of the trial court upon the [undisputed facts]" in this case is entitled to the same weight as the verdict of a jury and cannot be disturbed on this appeal "unless the evidence plainly and decidedly preponderates against such findings." State Road Commission of West Virginia v. Oakes, 150 W.Va. 709, 149 S.E.2d 293 and a prior case are cited in the Court's opinion in support of that proposition. I believe that this well-settled principal of law is not applicable to this case for the reason that the trial court's "finding" was based upon a stipulated, agreed state of facts and for the additional reason that the trial court's decision embodied

purely a legal proposition arising from the construction of the statute and its application to the undisputed facts. Dunning v. Barlow & Wisler, Inc., 148 W.Va. 206, 211, 133 S.E.2d 784, 788; Lusher v. Sparks, 146 W.Va. 795, 805, 122 S.E.2d 609, 615; Rinehart & Dennis Co., Inc. v. McArthur, 123 Va. 556, pt. 15 syl., 96 S.E. 829; 5 Am. Jur.2d, Appeal and Error, Section 825, page 267 and Section 826, page 268.

"In considering and deciding the constitutionality of a tax imposed and collected by this state, in the light of the provisions of the Constitution of the United States, this Court is bound by applicable decisions of the Supreme Court of the United States, even though such decisions are inconsistent with prior decisions of this Court." State ex rel. Battle v. B. D. Bailey & Sons, Inc., 150 W.Va. 37, pt. 2 syl., 146 S.E.2d 686. In deciding the question presented by Agreed Issue No. 10, we are not restricted by the legal proposition embraced in the quotation appearing immediately above, for the reason that this issue does not involve a constitutional question, but rather the application and effect of the clear language of the statute. 20 Am.Jur.2d, Courts, Section 225, page 556; 21 C.J.S. Courts § 205, page 360. Decisions of the Supreme Court of the United States, therefore, are not directly in point, but are at most persuasiye upon the question whether the business operations of United Fuel involved in Agreed Issue No. 10 are local in character and the question whether, in delivering and selling gas to the three industrial customers, United Fuel is earning "gross income derived from commerce between this state and other states of the United States * * *."

It was stipulated that "United Fuel has always been a natural gas company engaged in business in this State

as a public utility subject to regulation and in fact regulated by the Public Service Commission of West Virginia * * *." Its "utility service territory" embraces an area in West Virginia shown on a map which was made a part of the stipulation. It was further stipulated that, in carrying out other objects and purposes, United Fuel has always been engaged, in areas of West Virginia, Kentucky and Ohio, in what the Natural Gas Act denominates a "natural gas company;" that, as such, it has been regulated since 1938 by the Federal Power Commission; and that "Certain other business activities of United Fuel are not regulated." It is further stated in the stipulation that "The Federal Power Commission has no statutory jurisdiction to regulate the price at which gas is sold to any of said special contract industrial customers."

It is undisputed that the three industrial consumers here in question are all located within the area of this state in which "United Fuel has always been a natural gas company engaged in business in this State as a public utility subject to regulation and in fact regulated by the Public Service Commission of West Virginia * * *."

In relation to Agreed Issue No. 7, United Fuel has contended that its sales of gas to all the special contract industrial consumers, including the three industrial consumers involved in Agreed Issue No. 10, constituted private, unregulated business authorized by the Public Service Commission of West Virginia in an exercise of a reviewable discretion and hence does not constitute "the supplying of public services" within the meaning of the statute; and that the measure of the tax prescribed by the statute for the business of "the

supplying of public services" includes only gross income derived from utility services rendered under an official utility tariff. These contentions have been unanimously rejected by the Court in the decision of Agreed Issue No. 7. Accordingly, with respect to Agreed Issue No. 10, it cannot be validly asserted by United Fuel that it acts in any capacity other than as "a public utility subject to regulation and in fact regulated by the Public Service Commission of West Virginia" in making sales of gas to the three industrial consumers here in question, nor can United Fuel validly assert that its sales of gas to these three industrial consumers are not a part of its public utility business. United Fuel does not deny that its sales of gas, under its official utility tariff, to other industrial consumers in its public utility area of this state, with which industrial consumers it does not have special contracts, are sales made as a part of its activity as a public utility. United Fuel does not contend that its gross earnings from the sales of gas to these three industrial consumers are not a part of its gross income as "a natural gas company engaged in business in this State as a public utility * * *." United Fuel simply contends that these three industrial consumers fall into a different category for tax purposes merely on the basis of its assertion that gas is sold and delivered to them by its transmission lines rather than by its distribution lines, by means of which distribution lines gas is similarly sold and delivered by it as a public utility to other industrial consumers within this state, either under special contracts or under its official utility tariff schedule. It is clear that the bulk of the gas sold and delivered by United Fuel to consumers by means of its distribution lines likewise comes into such lines as a consequence of interstate commerce.

Counsel for United Fuel correctly assert that the language of Agreed Issue No. 10 involves only the provisions of the statute, but they rely solely on a single isolated sentence in that statute which is negative in character and at all times, in relation to that issue, they have avoided reference to the sentence following immediately thereafter which is affirmative in character. These two sentences are as follows: "The measure of this tax shall not include *gross income derived from commerce* between this state and other states of the United States or between this state and foreign countries. *The measure of the tax under this section shall include only gross income received from the supplying of public services.*" (Italics supplied.)

The first of the two sentences quoted above, the sole language of the statute upon which United Fuel rests its case in relation to Agreed Issue No. 10, merely represents, in my opinion, a legislative purpose to recognize fully the inhibition imposed upon the states by the Commerce Clause of the Constitution of the United States. Although United Fuel made a vigorous effort, under Agreed Issue No. 7 to escape the force of the second sentence quoted above, this Court, in deciding Agreed Issue No. 7 adversely to United Fuel, unanimously held that its sales of gas under special contracts to industrial consumers located within its utility service territory, to be used by such consumers in their several businesses, constituted a supplying of a public service within the meaning of the statute which, in clear and mandatory language, states that the measure of a tax under the statute "shall" include gross income received from "the supplying of public services." The phrase, "commerce between this state and other states", cannot be isolated and considered out of context. In seek-

ing to determine the legislative intent, the statute here in question must be read and considered in its entirety.

In my judgment, United Fuel as a natural gas company engaged in business in this state as a public utility, does not earn a single dime as "gross income derived from commerce", either interstate or intrastate, in the sales of gas to these three industrial consumers. It is not engaged in any business by which it earns or undertakes to earn a gross income from engaging in commerce as such. It is a public utility engaged in the sale of gas to consumers for a profit. This represents the source of its "gross income", irrespective of the type of pipeline by which the gas is sold and delivered to its consumers within its public service area of this state. The Court has held, on Agreed Issue No. 7, that the sales of gas by United Fuel to these three industrial consumers, located within United Fuel's public service area in West Virginia, are made by it as a part of its public utility business and that "gross income" thereby earned is earned by it as a public utility, and in no other capacity.

State ex rel. Battle v. Baltimore and Ohio Railroad Company, 149 W.Va. 810, 143 S.E.2d 331, involved a railroad corporation which, of course, is engaged in the business of transporting goods for a profit in both interstate and intrastate commerce. That corporation, therefore, clearly receives "gross income derived from commerce between this State and other states". Eureka Pipe Line Company v. Public Service Commission of West Virginia, 148 W.Va. 674, 137 S.E.2d 200, involved a public utility engaged in the business of transportation of petroleum by pipeline. That public utility also obviously received "gross income derived from commerce". These two business operations are, by their

nature, character and purpose, clearly distinguishable from the business in which United Fuel is engaged. Its gross earnings here in question are not derived from commerce. On the contrary, its gross earnings, so far as Agreed Issue No. 10 is concerned, are derived from its business as a public utility engaged in the sale of natural gas to consumers within this state.

"Where a person claims an exemption from a law imposing a tax, such law must be construed strictly against the person claiming the exemption." Owens-Illinois Glass Company v. Battle, 151 W.Va. 655, pt. 3 syl., 154 S.E.2d 854. The statute here in question is intended to impose a tax upon "any person engaging or continuing within this State in any public service or utility business," with the exception of certain businesses therein defined. United Fuel clearly is not in the category of any of the types of public utilities excepted from the application of the statute. The statute, I believe, is clear, unambiguous and mandatory in its provisions so far as this case is concerned. If the single sentence of the statute may be considered an exception to its general application, United Fuel has failed to sustain the burden of establishing that it falls within the purview of the exception or exemption for the reason that none of its earnings here in question constitute "gross income derived from commerce between this state and other states of the United States."

The essence of United Fuel's claim is, I believe, that the gas in question was received into United Fuel's pipeline and storage facilities as a consequence of its previous transportation in interstate commerce; and that the interstate character of the transportation was not changed or interrupted before the sale of such gas and the delivery thereof by transportation to and upon

the premises of the three several industrial consumers through United Fuel's pipeline facilities. After delivery of the gas by United Fuel through its own pipelines which extended to and upon the premises of the three several industrial consumers, it was there metered by means of facilities belonging to United Fuel. There, upon the premises of each of the three several consumers the gas was delivered, metered and sold. The gas belonged to United Fuel until it passed over the consumer's premises in each case and the sale and delivery of the gas was there finally consummated after the volume of gas had been determined by metering facilities owned by United Fuel. Transportation of the gas, or "commerce", was there terminated.

From the time and place gas was delivered into United Fuel's pipeline facilities, whether in this state or at a nearby point in Kentucky, the sale thereof to United Fuel had been fully consummated. Thereafter the gas was subject to its exclusive possession, control and ownership. From any of the points of delivery to United Fuel of gas which had reached such points as a consequence of prior interstate commerce, United Fuel, in the three instances here in question, was simply transporting its own gas, in its own facilities and for its own business purposes as a public utility engaged in the delivery and sale of gas to consumers for a profit. It derives no "gross income" simply from the commerce aspect of transporting its own gas, for its own business purposes, through its own facilities. It receives its gross earnings from the ultimate sale of gas to the consumers within this state. Its gross income from the sales of gas to the three industrial consumers was not enhanced or otherwise affected by the incidental element of trans-

portation which was essential in its business of sale and delivery of gas to the three industrial consumers.

"Interstate commerce continues as such until the goods shipped therein reach the point where the parties originally intended that the movement should finally end, and the further local movement by the consignee of the goods in furtherance of a valid business conducted by him constitutes intrastate commerce." Gambino v. Jackson, 150 W.Va. 305, pt. 3 syl., 145 S.E.2d 124. The obligation of the prior shipper of the gas in interstate commerce was to deliver it to United Fuel, the consignee and purchaser of the gas. The subsequent transportation of the gas for sale to the three industrial consumers was a mere incident of United Fuel's local, intrastate business. The initial shipper or shippers of the gas to United Fuel had no privity of contract with the three industrial consumers.

The tax here in question has no relation to the sale and delivery of the gas to United Fuel by interstate commerce. The tax is not directed at prior transportation, sale and delivery of gas to United Fuel. The tax here in question is upon United Fuel's privilege of making sales of gas to consumers on a local, intrastate basis in West Virginia. The measure of the tax is based on gross income earned by United Fuel from sale of gas to consumers within this state in carrying on its local, intrastate business. This local transportation ends when the gas is delivered to each of the three industrial consumers for consumption by it in its industrial operation. None of the gas involved in Agreed Issue No. 10 is transported by United Fuel from this state to any other state.

The case in this respect is quite different from such cases as West Virginia Pipe Line Co. v. State of West Virginia, 95 W.Va. 285, 120 S.E. 759.

Taxes of this general character, imposed upon taxpayers doing business in this state, have been upheld notwithstanding the fact that interstate commerce is in some measure involved incidentally in the primary function of performance within this state of a business which is local and intrastate in character. A wholly incidental and minor involvement of interstate commerce does not destroy or alter the primary character of the performance of a business which is local and intrastate in its nature and purpose. Gambino v. Jackson, 150 W.Va. 305, 145 S.E.2d 124; State ex rel. Battle v. B. D. Bailey & Sons, Inc., 150 W.Va. 37, 146 S.E.2d 686; Norfolk and Western Railway Company v. Field, 143 W.Va. 219, 100 S.E.2d 796; Arslain v. Alderson, 126 W.Va. 880, 30 S.E.2d 583.

For reasons stated, I am of the opinion that the gross income received by United Fuel from sales of gas to the three industrial consumers in question, under the stipulated facts of this case, does not involve "gross income derived from commerce between this state and other states of the United States"; that the income thus received by United Fuel is "gross income received from supplying public services", on a local, intrastate basis; and that, therefore, the tax in question was legally assessed by the defendant tax commissioner.

I have been authorized by Judge Browning and Judge Caplan to state that they agree with the views expressed in this concurring opinion.

PART THREE: THE JUDGMENT, ENTERED APRIL 3, 1969

STATE OF WEST VIRGINIA

At a regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April, 1969, the following order was made and entered, to-wit:

United Fuel Gas Company, a corporation,
Plaintiff Below, Appellee

vs. 12706

G. Thomas Battle, Tax Commissioner of
West Virginia, Defendant Below, Appellant

Upon an appeal from and supersedeas to a judgment of the Circuit Court of Kanawha County rendered on the 21st day of April, 1967.

The Court, having maturely considered the transcript of the record herein and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment, but not such as to require reversal of the entire judgment. It is therefore considered and ordered that the judgment of the Circuit Court of Kanawha County rendered on the 21st day of April, 1967, insofar as it upholds the tax levied and involved in agreed Issues Nos. 4, 5, 6, 7, 8 and 9, be and the same is hereby affirmed; but by reason of the erroneous action of said Circuit Court in refusing to render judgment for the defendant for the tax levied upon the unmeasured free gas produced by the plaintiff and furnished the lessors as required by the leases held by the plaintiff involved in agreed Issue No. 1, and in refusing to render judgment for the defendant for the tax levied

upon the gas sold and delivered by the plaintiff to duPont, Elk and Kaiser, involved in agreed Issue No. 10, and because the judgment rendered by the Circuit Court for $92,249.23 is clearly insufficient in that it does not include all the tax which the defendant is entitled to recover, that judgment is reversed, set aside and annulled. AND this proceeding is remanded to the Circuit Court of Kanawha County with directions that it render judgment in favor of the defendant and against the plaintiff for the full amount of the taxes levied against the plaintiff with interest from the date of such judgment and costs; and that the amount of all such taxes shall be determined in accordance with the principles stated and directions given in the written opinion aforesaid and further according to law; but no penalty shall be assessed against the plaintiff and no judgment for any penalty shall be rendered against it in this proceeding: all of which is ordered to be certified to the Circuit Court of Kanawha County. It is further ordered that the appellant do recover of and from the appellee his costs in this Court in this behalf expended and damages according to law.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Haymond, was concurred in by Judges Browning, Calhoun and Caplon, Judge Calhoun reserving the right to file a concurring opinion. Judge Haymond dissents as to point 7 of the syllabus. Judge Berry, deeming himself disqualified, did not participate in the consideration or decision of this case.

A True Copy

Attest: s/ George W. Singleton
Clerk Supreme Court of Appeals

PART FOUR: THE ORDER REFUSING UNITED FUEL'S PETITION FOR REHEARING, ENTERED JUNE 24, 1969

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of June, 1969, the following order was made and entered, to-wit:

United Fuel Gas Company, a corporation,
Plaintiff Below, Appellee

vs. 12706

G. Thomas Battle, Tax Commissioner of
West Virginia, Defendant Below, Appellant

The petition for rehearing and reargument filed in this proceeding having been maturely considered, a majority of the Court is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Judge Haymond would grant. Judge Berry did not participate, considering himself disqualified.

A True Copy

Attest: s/ George W. Singleton
Clerk Supreme Court of Appeals

PART FIVE: THE OPINION OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

UNITED FUEL GAS COMPANY,
a corporation,

vs. Civil Action No. 5656.

G. THOMAS BATTLE,
Tax Commissioner of West Virginia,

FRANK L. TAYLOR, JUDGE

This action was commenced on June 24, 1965, upon the filing with the Clerk of this Court, the plaintiff's Notice of Appeal from the determination and reassessment of Business and Occupation Taxes and penalties claimed by the defendant to be due and owing. By such notice (Part One; Jurisdiction and Venue), the plaintiff asserts that a final determination and reassessment has been made by the defendant pursuant to Code, 11-13-7b; that notice of this appeal was given pursuant to Code, 11-13-8; that the plaintiff, a taxpayer within the meaning of Article 13. Chapter 11 of the Code, for the years 1957 through 1961 timely filed tax returns and paid the amount computed to be due; that pursuant to Code, 11-13-7, an assessment was levied by the defendant against the plaintiff on December 10, 1963 and served December 13, 1963; that the plaintiff petitioned the defendant for reassessment on January 9, 1964, object-

---

* This opinion is not to be reported. It is, however, a part of the Record on this appeal (R. 215-62).

ing to all of the items of the original assessment and seeking refund of other taxes erroneously paid; that upon the hearing on the said petition, the defendant's reassessment modified the original assessment, asserting tax liability in the amount of $971,167.37 and imposing penalties in the amount $353,186.02, a total of $1,324,-353.39. The plaintiff, by said notice, contends that the reassessment erroneously asserts a tax liability and penalties against it, setting forth twelve assigned errors to the reassessment. The assigned errors, by stipulation of counsel, were subsequently embodied into the fourteen "Agreed Issues" upon which the case was finally submitted.

Part Two of the plaintiff's Notice pertains to the general nature of its business operations. Part Three of the Notice, entitled "The Background of the Reassessment," refers to three previous audits made by the Tax Commissioner and his predecessors in office of the plaintiff's tax returns, involving common questions of classification and taxability with the instant contest, by which, in the two prior audits, no formal assessments were made against the plaintiff. Part Four of the Notice correlates the assigned errors of the reassessment to defendant's six "Audit Findings." Specific reference thereto will be hereinafter made as they become pertinent to the discussion. Part Five of the Notice contends that bond should not be required of the plaintiff under Section 8 of the Tax Statute, inasmuch as plaintiff's properties subject to tax liens are adequate to secure any possible obligations. Part Six contains the plaintiff's prayer for relief, seeking determination of the twelve assigned errors and relief from the reassessment.

The defendant's answer, filed July 20, 1965, which is some twenty-six pages in length, responds to each of the

allegations of the Notice and, in substance, controverts all of the conclusions drawn by the plaintiff. More specific references to this pleading will, when pertinent, be made herein upon discussion of the stipulated issues.

By paragraph 53 of the answer, defendant asserted the necessity for an appeal bond by the plaintiff, seeking dismissal of this appeal for the plaintiff's failure to post such bond within the appeal period allotted by Code, 11-13-8. On August 30, 1965, the plaintiff lodged with the Clerk of this Court a proper bond in the amount of $1,324,353.39. By order entered October 20, 1965, upon the reasons assigned by me in my letter-memorandum of opinion dated October 13, 1965, said motion to dismiss was overruled, and paragraph 53 was stricken from the answer.

On April 18, 1966 nine volumes of stipulation material were failed. The first volume, some 182 pages in length, recites that all the facts stipulated are to be considered as true in this proceeding, but reserves to the parties the right to object to the relevancy or materiality of such facts and, upon trial of the case, to explain or supplement the facts stipulated. However, by further agreement of counsel, the case was submitted on the pleadings, stipulation material and briefs, without any additional proof. The remaining stipulation material, referred to as the "Stipulation Exhibits," comprising eight of the nine volumes, contains some 159 exhibits.

Abbreviated references hereinafter made to the stipulation material will be in the following manner: The enumerated paragraphs of Volume One, entitled "Stipulation Submitting Agreed Issues and Admitting Facts But Reserving Right to Object to Relevancy of Materiality," will be parentheticálly cited by paragraph

number without any additional designation; and, the enumerated exhibits contained in Volumes Two through Nine. "Submitting Exhibits But Reserving Right to Object to Relevancy and Materiality," will also be cited parenthetically but the exhibit number will be preceded by the letter "X".

The memoranda of authorities submitted in this case are comprised of the defendant's "Pre-Trial Brief," the "Main Brief of Plaintiff," the defendant's reply brief, and plaintiff's brief in rebuttal. In addition to the memoranda of authorities submitted on behalf of the parties hereto, a joint brief of Amicus Curiae was filed by counsel for E. I. du Pont de Nemours and Company and Kaiser Aluminum & Chemical Corporation, which companies appear to have a vital interest in the outcome of one phase of this case.

Upon all of the foregoing, this case was submitted for decision.

As a part of the first volume of the stipulation material, submitting the agreed issues upon this appeal, the parties agree as follows: That, subject to the defendant's objection to the order of this Court, entered October 20, 1965, this Court has jurisdiction of this matter, that the venue is proper, and that this action is prosecuted under the provisions of Code, 11-13-8; that plaintiff is a taxpayer within the meaning of Code, Chapter 11, Article 13; that the plaintiff timely made tax returns prescribed by Section 5 of said article and chapter for the years 1957 through 1961, and paid the amounts computed by plaintiff to be due; that the defendant, in 1962 and 1963, conducted a field audit for ascertaining plaintiff's Business and Occupation Taxes for the years 1957 through 1961; that pursuant thereto, an assessment was

issued against the plaintiff in the amount of $2,424,-988.57; that plaintiff filed for reassessment on January 9, 1964, assigning errors and seeking a refund; that a hearing thereon was held and defendant rendered a reassessment which was served by the plaintiff May 18, 1965, for taxes in the amount of $971,167.37, with penalties in the amount of $353,186.02.

Agreed Issue No. 1 is as follows:

> "Does Tax Section 2a exclude from its measure 'free gas' delivered by United Fuel to an oil and gas lessor from United Fuel's gas well on the lessor's land, pursuant to a covenant in the oil and gas lease, when the 'free gas' is taken by the lessor prior to measurement for purpose of paying the lessor's cash royalty?"

The pertinent facts with regard to Agreed Issue No. 1 are to be found in the "Stipulation of Agreed Issues," (59) through (81), and the "Stipulation Exhibits" therein referred to. Without attempting to summarize all of the stipulated facts, some of the more pertinent facts are as follows: In obtaining leases for gas and oil lands, the plaintiff uses three basic forms of leases in which the "free gas" provisions are embodied. The main or primary consideration, however, in all such leases is the royalty clause (70). Oil royalties are payable in kind, and gas royalties are payable in cash: the reason therefor being the relative difficulty of containing and handling the natural gas (71). The "free gas" provision of the lease, which is separate from the royalty clause (72), limits the use thereof to heating and lighting a single dwelling house on the leased premises (72), and with the exception of about 300 of the 8500 leases, a volumetric limitation of "free gas" is imposed on an annual basis (74). Although the leases require

the lessors to take "free gas" from the wellhead, the plaintiff has permitted connections at other points of intersection where more convenient; 33% of the connections are made at the wellheads, 10% from the pipeline ahead of the royalty meter, and 57% after the royalty meter (75). Royalties are paid on gas taken after it passes the royalty meter, but are not paid on "free gas" taken before it goes through the meter (79).

Prior to 1959 the plaintiff reported and paid taxes on all free gas under Section 2a (66). In 1959 (subsequent to this Court's decision in Triad Oil Co. v. Ferguson, memorandum of opinion dated July 8, 1955), the plaintiff omitted all free gas deliveries in computing its gas production for Business and Occupation Taxes (67). Plaintiff concedes that it erroneously omitted to report free gas delivered after measurement at the royalty meter (57%) for taxation (64).

Upon the original assessment, and the reassessment, the defendant asserts the plaintiff's liability for Business and Occupation Taxes under Section 2a for the years in question, upon Audit Finding 2, on all gas produced, including "free gas" (59, 60). Upon this appeal, the plaintiff concedes that it has erroneously omitted from the computation of its taxes "free gas" deliveries to its lessors after royalty measurement, consisting of 57% of the total "free gas" deliveries, and amounting to $4,158.19 in taxes (64), but denies liability for penalties thereon (65). The plaintiff, however, contends that under Section 2a "free gas" delivered at the wellhead, or ahead of the royalty meter, is not taxable.

Code, 11-13-2a provides in part as follows:

> "Upon every person engaging or continuing within this state in the business of producing for

sale, profit or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: x x x; natural gas, in excess of the value of five thousand dollars, seven and eighty-five one-hundredths per cent; x x x. The measure of this tax is the value of the entire production in this state, regardless of the place of sale or the fact that the delivery may be made to points outside the state."

The plaintiff contends that Agreed Issue No. 1 is controlled by the ruling of this Court in the case of Triad Oil Co. v. Ferguson, supra, which was refused docketing by the Supreme Court of Appeals on certified questions, September 26, 1955. The issue before this Court in the Triad case was whether the plaintiff-lessee, was liable for occupational privilege taxes under Code, 11-13-2a on the one-eighth royalty produced by the lessee and delivered in kind to the lessor or his designated agent. In that case, upon consideration of the decision in Cole v. Pond Fork Oil & Gas Co., 127 W. Va. 762, (recognizing the distinction between production taxes, "which this State had studiously avoided", and the privilege taxes imposed by Article 13) and of the decision in Jones v. Columbian Carbon Co., 132 W. Va. 219 (holding that a lessee could recover amounts withheld by the lessor pursuant to a contract between lessor and lessee for the payment of tax on the lessor's royalty under former Code, 11-13-2j—which was declared unconstitutional), and inasmuch as the statute provided that the amount of the tax was to be the value of the article produced as shown by the gross proceeds derived from the sale thereof by the producer, except as herein-

after provided", there being, in fact, no sale thereof from which proceeds were derived, I held that the Legislature had failed to provide a means of measuring the tax upon such royalty payments, and that, therefore, the lessee was not liable under Section 2a for taxes on oil royalties paid in kind.

Also considered by me in the Triad case, Id., was the possible applicability of the provision of Section 2a, imposing the tax on the value of the articles produced, "except as otherwise provided". Whereupon, it was my opinion that this proviso had no application to the royalties delivered in kind. Moreover, in that case, I held that the last sentence of Section 2a, providing that the measure of the tax is the value of the entire production in this State, was designed merely to differentiate between the production privilege tax, and the transportation tax which was held to be invalid insofar as it affected interstate commerce in the Eureka Pipe Line cases found in 257 U. S. 265, 66 L. Ed. 227; and 261 U. S. 393, 67 L. Ed. 715, and that, therefore, such provision was not intended as a means of measuring the oil royalties paid in kind.

Counsel for the defendant, in discussing the Triad case in their briefs, point out the distinction made by me between the application of Section 2d upon producers of natural gas, whereby the producer ordinarily sells the gas and pays the lessor his royalty in cash from the proceeds, and the producer of oil who ordinarily pays the oil royalty in kind to the lessor. While the distinction between the ordinary payments of oil and gas royalties is important in such cases, there is also an equally important distinction between gas royalties paid from the proceeds of the production and "free gas" which is

delivered in kind to the lessor. In my view, "free gas" taken by lessors prior to metering would be more comparable to oil royalties delivered in kind than to royalty payments received by lessors for the gas produced and, therefore, not contemplated by the statute.

As urged by counsel for the defendant, a clear and unambiguous statute should be applied, not construed. J. D. Moore, Inc. v. Hardesty, 147 W. Va. 611. In the case at bar, the applicable statute (Section 2a) provides that the amount of the tax is to be equal to the value of the articles produced as shown by the gross proceeds derived from sale thereof. Clearly, under this provision, since there is obviously not a sale to the lessor of such "free gas", the statute can have no application.

Accordingly, for the foregoing reasons, I am of opinion to rule in the affirmative upon Agreed Issue No. 1.

The next area of consideration (Agreed Issues Nos. 2 through 6) concerns the wholesale sales of gas by the plaintiff to other gas companies for resale, the gross income of which is assessed for taxation by the defendant under Section 2c, Article 13, Chapter 11 of the Code. Agreed Issues Nos. 2, 3, 4 and 5, in subsection (a) thereof, all involve the common question of whether the temporary storage of gas by United Fuel's wholesale customers, in West Virginia storage wells, prior to the exportation of the gas for consumption outside the State, constitutes an interruption of the interstate transportation of gas. Agreed Issue No. 2 specifically involves gas produced in other states and transported by means of other companies' pipelines to Kentucky points of acquisition by United Fuel, thereafter transported by United Fuel's pipelines into this State prior to sale. Agreed Issue No. 3 involves the wholesale sale to other

gas companies in West Virginia, for resale, of gas produced in other states and transported by other companies' pipelines to West Virginia points of acquisition by United Fuel, and thereafter transported by United Fuel's pipelines to the point of sale by United Fuel. Agreed Issue No. 4 involves the wholesale sales by United Fuel, to other gas companies in West Virginia for resale of gas which is produced by other companies in West Virginia, acquired by United Fuel in this State, and then transported by United Fuel's pipeline through Kentucky and back into West Virginia prior to the sale. Agreed Issue No. 5 involves the wholesale sales by United Fuel to other gas companies in West Virginia, for resale by them, of gas produced by other companies in West Virginia, acquired by United Fuel's pipelines and transported within the State to points of sale. Therefore, as to each wholesale transaction described by Agreed Issues Nos. 2, 3, 4 and 5, the particular question raised by subsection (a) thereof is whether the Commerce Clause of the Federal Constitution prohibits the application of the West Virginia Business and Occupation Tax on the sale when the gas thus sold is, thereafter: "injected by the wholesale customers into temporary underground storage in West Virginia, and subsequently removed from underground storage and transported by means of pipelines out of West Virginia to points of consumption in other states.".

Agreed Issues Nos. 2 through 6 arose out of Audit Finding 3, which asserted the application of Section 2c to part of the sales of gas by United Fuel for resale to Atlantic Seaboard in Kanawha County at Delivery Points 6A and 6B (Map Exhibit 137), and to Manufacturers Light and Heat Company in Gilmer and Roane counties at Delivery Points 7B and 7A, respectively, (Map Exhibit 137) (84). In the Notice of Appeal the

third assignment of error asserts that the tax was erroneously assessed against all FPC—regulated wholesale sales of gas imported into West Virginia, and that the taxation thereof is prohibited by the Commerce Clause of the Federal Constitution. The fourth assigned error asserts that the sale of gas which is injected into underground storage fields in West Virginia, for later exportation out of the State, may not be taxed by this State. Assigned Error 5 asserts the FPC—regulated wholesale sales of gas ultimately consumed in West Virginia, which has been exported outside the State and returned for ultimate consumption, cannot be taxed in this State without violation of the Commerce Clause of the Federal Constitution. Assigned Error 6 denies the right of this State to tax FPC—regulated wholesale sales of gas purchased by United Fuel from other West Virginia producers which is ultimately consumed in West Virginia, but commingled in United Fuel's interstate transmission system with gas originating in other states, under settled administrative interpretations by the Tax Commissioner and the Attorney General.

Section 2c of Article 13, Chapter 11 of the Official Code of West Virginia of 1931, as amended, provides in part as follows:

> "Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, x x x there is likewise hereby levied, and shall be collected, a tax equivalent to one-half of one per cent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-five one-hundredths of one per cent of the gross income of the business."

From the stipulation material, (82) through (202), it is apparent that the plaintiff's unreported wholesale sales of gas to other gas companies, particularly taxed by the reassessment, but claimed by the plaintiff to be wholly non-taxable, are, as heretofore noted, made at Delivery Points 6A and 6B (Map Exhibit 137) to Atlantic Seaboard, and at Delivery Points 7A, 7B and 7B (TM7) Map Exhibit 137) to Manufacturers Light and Heat. The amount claimed in additional taxes for such deliveries (excluding penalties) is $48,833.03, not including the amount paid by plaintiff on Audit Finding 4, and applied to Audit Finding 3, which would amount to $102,650.61 (91). Paragraphs (101) through (156) of the stipulation submitting the agreed issues described the operation in considerable detail with reference to the stipulated exhibits and describe the sales to Atlantic Seaboard and Manufacturers Light and Heat at each of the delivery points during both the summer and winter periods.

It appears from the stipulation material and exhibits that the practice of storing natural gas purchased by United Fuel from suppliers of Southwest gas is the result of long-term contracts designed to encourage, by pricing clauses, the acceptance of gas at a steady level (52). Gas which is withdrawn by United Fuel during the winter season is substantially the same gas that was injected into storage during the summer immediately preceding (53). For the year 1961, which is substantially representative of all the years in question, plaintiff injected 58,987,297 MCF into underground storage and withdrew 53,450,483 MCF for its wholesale and retail sales in West Virginia (54).

With regard to wholesale sales to other gas companies, the plaintiff's sales to Atlantic Seaboard at Delivery

Point 6A, for both summer and winter periods, are made in Kanawha County (101) under contract (X 30); the normal 1961 flow is shown on Map Exhibit 138. The origin of all such deliveries is from the Southwest (103), acquired by plaintiff in Kanawha County and transported directly through plaintiff's system to Atlantic without storage (103). The gas is thus commingled by Atlantic with gas received at Delivery Point 6B (104). Gas delivered at Delivery Point 6B, in Kanawha County, is estimated to consist of 95% Southwest gas, 3% Kentucky gas, 1% West Virginia P-system gas (gas produced in West Virginia, transported to Kentucky and back to West Virginia), and 1% other West Virginia gas (107). The gas sold by plaintiff to Atlantic in the summer periods at Delivery Point 6B, carried directly to Atlantic (108), is immediately commingled by Atlantic with gas received at Delivery Point 6A (109), and either injected into underground storage fields in Upshur and Preston counties, resold at wholesale to Cumberland and Allegheny, or transported directly out of West Virginia for ultimate public consumption (110). A portion of the gas thus sold to Cumberland and Allegheny in the summer period is resold to West Virginia consumers, directly or through Maryland transmission lines, but most of the gas is sold to Maryland consumers (111). The 1961 pattern of Atlantic Seaboard's summer operations was substantially the same in prior years, with certain exceptions (112, 113). Audit Finding 3 asserts the taxability of the gas stored by Atlantic Seaboard and then sold to Cumberland and Allegheny for resale to West Virginia consumers (114).

During the winter period, at Delivery Point 6B, estimated deliveries to Atlantic Seaboard were in 1961 composed of 24% Southwest gas, 1% Kentucky pipeline

gas, 15% West Virginia gas, and 75% storage gas (sic) (116). Such deliveries were, similar to the summer operation, commingled by Atlantic with gas from Delivery Point 9A (117), and thereupon resold at wholesale to Cumberland and Allegheny either for consumption by West Virginia consumers or transported out of the State (118, Map Exhibit 141). Added to these sales were the volumes purchased from the plaintiff and stored by Atlantic Seaboard during the summer periods (118).

With regard to the wholesale sale to Manufacturers Light and Heat, the operational facts, insofar as they bear upon the legal issues stipulated in this case, are substantially the same (122-155).

In the written memoranda of authorities and argument, counsel for the parties have adopted different formats in the development of their respective positions with regard to the gas storage issue [(a)] of Agreed Issues Nos. 3, 3, 4 and 5. Counsel for United Fuel presents argument upon Agreed Issues Nos. 4(a) and 5(a) (involving domestically produced gas) before arguing Agreed Issues Nos. 2(a) and 3(a) (involving foreign-origin gas), whereas counsel for the defendant, beginning at page 140a of their main brief, argue the underground storage issue generally, without specific reference to origin. In this memorandum of opinion, I shall first consider and decide Agreed Issues Nos. 2(a) and 3(a), dealing with gas produced in other states and purchased by United Fuel either within or without this State.

In the main brief of counsel for United Fuel, after prefacing the discussion on the issues concerning taxation of wholesale sales of gas to other gas companies with excerpts from the decision in Freeman v. Hewit

(1946), 329 U. S. 249, 91 L. Ed 265, (wherein the Supreme Court recites the long and complicated course of adjudication involving the conflict between state taxation and the Commerce Clause) counsel cite, as specific authority for the plaintiff's position on Agreed Issues Nos. 4(a) and 5(a), Eureka Pipe Line Company v. Hallanan (1921), 257 U. S. 265, 66 L. Ed. 227, and United Fuel Gas Company v. Hallanan, 257 U. S. 277, 66 L. Ed. 234, which decisions invalidated the West Virginia privilege tax imposed by Acts of 1919, Ex. Sess., c. 5, on the transportation of oil and gas in this State. In those cases, however, unlike the case at bar, the transportation involved was a continuous flow of oil and gas from this State to others. While it is true that the taxpayer in the Eureka case, supra, was required by State law to keep enough oil in its tanks and pipes to satisfy the producers' credits prior to its delivery outside the State, the Court found that since the flow was continuous, the movement thereof controlled by the plaintiff, and the stored quantities thereof—to satisfy credits—consisted of oil which "runs into a tank on one side and out on the other", the interstate character of the flow was maintained, and it was held that the tax was, therefore, repugnant to the Commerce Clause. Similarly, in the United Fuel Gas Company case, supra, involving the same questions as applied to the transmission of natural gas the Supreme Court observed that there was "no break, no period of deliberation, but a steady flow, ending, as contemplated from the beginning, beyond the state line."

In the case of Hope Natural Gas Co. v. Hall, 102 W. Va. 272, cited by the plaintiff, the Supreme Court of Appeals upheld the constitutionality of the Business and Occupation Tax (specifically Section 2a thereof), as

applied to natural gas produced in the State but destined for ultimate consumption outside the State. That decision was affirmed by the United States Supreme Court in Hope Natural Gas Co. v. Hall (1927), 274 U. S. 284, 71 L. Ed. 1049, with the admonition that the measure of tax could not be upon the gross receipts from interstate commerce, but must be limited to the value of the gas at the well. These decisions, however, are of limited value upon the instant case inasmuch as the facts in the Hope case showed that the transmission of the gas was clearly continuous and uninterrupted.

In Interstate Oil Pipe Line Co. v. Stone (1949), 337 U. S. 662, 93 L. Ed. 1613, cited and discussed by counsel for both parties, the facts reveal that the State of Mississippi imposed a tax on the operation of a pipeline within that state, measured by the gross receipts from its operation. The pipeline was owned by a Delaware corporation, qualified to do business in Mississippi, and was operated for the purpose of transporting oil from lease tanks in various oil fields in Mississippi to loading racks adjacent to railroads elsewhere in the state. The oil was then pumped from the racks into railroad tank cars for shipment outside the state, except that when tank cars were not available, the oil was stored near the racks for short periods. The United States Supreme Court, by a divided court, upheld the tax. While the question of the interstate aspect of the operation of the pipeline was argued by the parties, the Supreme Court did not decide the precise question of whether the "business of operating the intrastate pipe lines (was) interstate commerce", but reasoned that even if it was, the state of Mississippi had the power to impose the tax under the construction of the tax statute by the Supreme Court of Mississippi since the

activities upon which the tax was imposed were wholly carried on within the state of Mississippi. The Supreme Court noted that the tax was not discriminatory inasmuch as it could not be repeated in other states and that, accordingly, there could be no due process objection to the tax. In affirming the state court's decision, the Supreme Court accepted the construction of the statute given by the state court, as imposing a tax on the privilege of operating a pipeline wholly within the state, and not upon the gross receipts of the operation. By footnote reference, the Supreme Court noted that the State had not attempted to tax the receipts on shipments of oil through lines carrying oil directly outside the state. While it is somewhat difficult, upon the facts and statutes involved in the Interstate Oil Pipe Line Co. case to comprehend the subtle distinction made by the majority opinion between the operation taxed, and income derived from similar operations which appear to be clearly interstate in nature, the rule of this case has apparently never been motified or overruled. The case at bar, however, would not appear to be governed by the ruling in Interstate Oil Pipe Line Co., supra. The tax sought to be imposed in the instant case is a tax upon the business of selling natural gas within the State, measured by the proceeds thereof upon gas which, admittedly, is destined—though delayed—for out-of-state consumption and not, as in the Interstate Oil case, a tax upon the operation of the facility used to transport the product. Also, in the case of Michigan-Wisconsin Pipe Line Co. v. Calvert, (1954), 347 U. S. 157, 98 L. Ed. 583, cited by counsel for plaintiff, the occupation tax on gathering gas, which was held to be unconstitutional, was unlike the assessment involved in the case at bar, upon the occupation of gathering gas for the

purpose of immediate interstate transmission. The facts in that case show that the gas flowed in a steady and continuous stream.

In my opinion, the two authorities cited by counsel for the plaintiff most nearly in point with the issue now under consideration in the case at bar, are Railroad Commr's v. Worthington (1912), 225 U. S. 101, 56 L. Ed. 1004, and Standard Oil Co. v. FTC (1951), 340 U. S. 231, 95 L. Ed. 239. In the Worthington case the Supreme Court held that the impost on coal destined out of the state was violative of the Commerce Clause even though, on occasion, in the reloading process from railroad cars to sea-vessels, the coal was accumulated on land for a time before the later shipment. That case is perhaps distinguishable from the case at bar in that the accumulation of coal was merely a temporary delay necessitated by the limitations of transportation facilities, whereas, in the case at bar the stoppage in transit is not occasioned by transmission limitation, but rather is primarily for the purpose of facilitating the operations of the purchaser.

The Standard Oil Co. case, supra, however, in my opinion, comes very close to the case at bar upon the issue of whether the shipments were in interstate commerce. In that case, the petitioner, an Indiana corporation, refined gasoline in Indiana and distributed a portion of the gasoline in Michigan. The gasoline sold in the Detroit area was carried for the petitioner by tanks on the Great Lakes from Indiana to the petitioner's marine terminal at River Rouge, Michigan. There, enough gasoline was accumulated during each navigation season so that a winter's supply for distribution was available from the terminal. Also, the Court noted that

although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the territory were fairly constant in that the customers' demands could be accurately estimated "so the flow of the stream of commerce kept surging from Whiting (Indiana) to Detroit." In deciding that the sales made by petitioner in the Detroit area came within the jurisdiction of the Clayton Act, as amended by the Robinson-Patman Act, as sales made in interstate commerce, the opinion in that case concluded the consideration of the interstate commerce question by saying at page 238:

> "x x x Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character (Citing cases.)"

The Standard Oil Co. case, supra, therefore, in my view, is probably most nearly in point of any of the cases cited by either of counsel on the question of whether the shipments were in interstate commerce and whether the interruption by temporary underground storage, in the transmission of the product, terminated its interstate journey. As heretofore noted, the agreed issues at bar described the storage as "temporary underground storage" of natural gas in West Virginia, which is "subsequently removed from underground storage and transported by means of pipelines out of West Virginia to points of consumption in other states." Moreover, in my view of the facts in the instant case, the underground storage of the wholesale sales involved in Agreed Issues Nos. 2 (a) and 3 (a) is an integral part of a complex operation in the movement of natural gas from its origin, either in the Southwest or in Kentucky, to its ultimate destination outside this State. Clearly, a direct and uninterrupted movement of such gas would be in interstate commerce, and could not be taxed

in this State. This much is recognized by the defendant, as evidenced by his ruling on proceeds from sales of foreign-origin gas shipped directly out of the State. However, with regard to the gas which is temporarily stored in this State, although ultimately destined for out-of-state consumption, it is contended by the defendant that such an interruption in its transmission renders it susceptible to state taxation under Section 2c.

The primary consideration in all of such cases is to determine the practical effect of the tax sought to be imposed. Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 225, 52 L. Ed. 1031, 1036. In the case at bar, the natural gas, when stored, has not reached its intended ultimate destination, nor is its storage in this State shown to be for any purpose other than to facilitate its later delivery to a particular point outside this State. As shown by the various detail panels attached to the Map Exhibits in this case, and by other stipulated facts, the volume of gas injected into underground storage during the summer periods closely approximates the volumes withdrawn during the winter months when the demand is high, demonstrating that the storage thereof, for all practical purposes, is in contemplation of a reasonably anticipated seasonal demand. In my opinion, the facts in this case reveal an operation which attempts to insure the continuous flow of natural gas to ultimate consumers outside the State on an annual and, in some instances, even broader forecast. Since admittedly, if the flow were direct and not delayed during the summer periods the tax could not be imposed, so that if the wholesale sales were directly and immediately responsive to out-of-state demands, no tax would be imposed upon such sale, from a purely practical standpoint, but on a broader basis of time, necessitated by the seasonal demands, the principle

involved in direct interstate transmission and delayed transmission would appear to be the same. A predetermined amount of gas is required by the purchasers for their consumers outside this State; the purchases are made, and pursuant to the anticipated demands, the gas is transported outside the State, though the portion thereof is temporarily delayed here. I am therefore of opinion that such sales, as described by Agreed Issues Nos. 2 (a) and 3 (a), are in interstate commerce and that the tax sought to be imposed would constitute an unreasonable burden thereon. Accordingly, Agreed Issues Nos. 2(a) and 3(a) will be answered in the affirmative.

Inasmuch as the temporary storage question [subsection (a)] of Agreed Issues Nos. 4 and 5 is secondary to the question of whether, in the first instance, the sale of locally produced natural gas, regardless of its ultimate destination, constitutes a local taxable event, I will defer ruling on these subsections until after considering the other subsections of Agreed Issues Nos. 4 and 5.

Subsection (b) of Agreed Issues Nos. 2, 3, 4 and 5 involves the question of whether the wholesale sales of gas to other gas companies in West Virginia for resale by them, when "transported by means of pipelines by the wholesale customers out of West Virginia and then returned for resale and ultimate consumption in West Virginia," constitutes interstate commerce, the local taxation of which would be prohibited by the Commerce Clause of the United States Constitution. Subsection (c) of Agreed Issues Nos. 2, 3 and 4 involves the same situation and question with regard to sales which are "transported by means of pipelines in West Virginia by the wholesale customers to point of resale and ultimate public consumption in West Virginia."

In support of the plaintiff's position on Agreed Issues Nos. 2(b), 2(c), 3(b) and 3(c), complete reliance is placed upon the decision in Mississippi v. Interstate Natural Gas Co. (1931), 284 U.S. 481, 76 L. Ed. 156, which is quoted in its entirety in the brief. That case involved an attempt by the State of Mississippi to impose a franchise tax on Interstate Natural Gas Company for natural gas conveyed through its pipelines from the production fields in Louisiana to local distributing companies in Mississippi. The United States Supreme Court held that such an operation involved interstate commerce between Louisiana and Mississippi, inasmuch as the gas was not "worked over", other than by reducing its pressure to make it ready for delivery to the purchaser. While it is true that the case at bar is somewhat analogous to the Interstate Natural Gas Co. case, supra, I would not go so far as counsel for the plaintiff, to say that it is on all fours with the instant case.

The test in such cases, in determining local taxability of a product moving across state boundaries, seems to depend upon the extent to which the gas is subjected to local processing. East Ohio Gas Co. v. Tax Commission (1931), 283 U. S. 465, 75 L. Ed. 1171; Southern Natural Gas Corp. v. Alabama, 301 U. S. 148, 81 L. Ed. 970; Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 64, L. Ed. 434. In East Ohio Gas Co. v. Tax Commission, supra, the Supreme Court approved the Ohio privilege tax on the business of supplying natural gas to consumers within the state, computed on the gross receipts of the intrastate business. The dispute in that case arose over the inclusion by the Tax Commission, for taxation, of receipts from local consumption of natural gas which was produced outside the state and transmitted to the taxpayer's lines at the state boundary. In reach-

ing its conclusion, the Supreme Court first pointed out that the transportation of gas from wells outside Ohio, through the producer's pipelines to the state line, and then by the taxpayer's lines to the connection with local systems, was essentially national—not local—in character and was interstate commerce within, as well as without, the state. However, the Court said that the act of reducing the pressure and placing the gas in supply mains for distribution in thousands of relatively tiny streams, which enter the small service lines connecting such mains with the pipes on the consumers' premises, was like the breaking of an original package, after shipment in interstate commerce, and that, therefore, the business of furnishing of gas in Ohio did not constitute interstate commerce, but was a purely local business. Likewise, in Southern Natural Gas Corp. v. Alabama, supra, where the supplier of out-of-state gas sold to local distributing companies and large consumers, for the purpose of which it installed metering stations and established requisite service lines to such customers, the Supreme Court held that such treatment and division of the gas constituted the doing of intrastate business within the state of Alabama, and was subject to reasonable franchise taxes.

In the case at bar, the service agreements for the sale of natural gas by the plaintiff to the various purchasers have been made a part of the record (X 30, et seq.). These agreements prescribe, among other things, the points of delivery, and the delivery pressures. The supply of gas in the instant case, unlike that in Interstate Natural Gas Co. case, supra, was shown by the flow diagrams (Map Exhibits 134 and 135), involves movement through much of the entire complex of the plaintiff's main transmission and storage facilities, for gathering and transporting natural gas. While it is extremely difficult in the case at

bar to distinguish between what is to be considered a distribution or supply main—as opposed to a main transmission line—for the purpose of ascertaining whether the original package, so to speak, has been broken into a number of smaller packages for final distribution or consumption, which would constitute a local activity subject to state taxation, upon consideration of all the evidence before me, I am of opinion that the extent of the plaintiff's operations with respect to the delivery of Southwest gas to the various purchasers, as described by Agreed Issues Nos. 2(b), 2(c), 3(b) and 3(c), does not within the meaning of the authorities cited, constitute a sufficient local activity as would subject the proceeds of the sales to the Business and Occupation Tax. While there is a division by the plaintiff of its main supply of Southwest gas involved in such sales, and a distribution thereof by the plaintiff, it is not, in my view, such final distribution or sufficient division as would constitute a local activity and permit the subjection of the proceeds thereof to total taxation. Moreover, aside from the issue of temporary storage of the gas, while the system through which such gas travels is intricate and complex, the gas is not subjected to local processing, except for variations in the pressure along the system which, of itself, has recently been held not to be determinative of local regulatory power. Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana (1947), 332 U. S. 507. 92 L. Ed. 128.

Therefore, while there is some disparity in the factual situation involved, I am of opinion that the case of Mississippi v. Interstate Natural Gas Co., supra, is most nearly applicable to Agreed Issues Nos. 2(b) and 2(c). Also, upon the same authority, and the reasoning in the East Ohio Gas Co. case, supra, since the gas which is re-

ceived by the plaintiff in this State, as described in Agreed Issue No. 3, and delivered to the wholesale purchasers through direct transmission lines without processing, I am of opinion that such sales are, likewise, in interstate commerce, and that the taxation thereof would unduly burden interstate commerce. Accordingly, I am of opinion to decide Agreed Issues Nos. 2(b), 2(c), 3(b) and 3(c) in the affirmative.

However, upon Agreed Issues Nos. 4 and 5, not involving gas in the midst of an interstate journey, but gas which is locally produced and sold, the authorities would appear to support the imposition of the local tax. In International Harvester Co. v. Indiana, 322 U. S. 340, 88 L. Ed. 1313, the United States Supreme Court upheld an Indiana gross income tax on sales by a foreign corporation, through branches located in Indiana, to dealers and users residing outside the state, in which case the customers came to Indiana, accepted delivery, and then transported the goods to another state. Under these circumstances the Court held that the tax was proper, stating at page 345:

> "x x x The Wood Proserving Corp. case (Dept. of Treas. v. Wood Preserving Corp., 313 U. S. 62, 85 L. Ed. 1188) indicated that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and delivery took place in Indiana. These events would be adequate to sustain a sales tax by Indiana. x x x."

The Court said that the "local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce."

In McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 39-40, 84 L.Ed. 613, the Supreme Court upheld the New York City tax on sales of goods within the City upon a producer of coal, which sales, with one exception, were consummated and delivered in the City. In approving the tax, the Court said that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of the state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing business. The Court said at page 47:

> "X X X The like taxation of property shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation."

And in the Wood Preserving Corp. case, supra, the Supreme Court held that the Indiana gross income tax was properly applied to a foreign corporation as to sales of railroad ties within the state, despite the fact that the ties purchased by the respondent within the state were simultaneously resold to the B. & O. Railroad Company with the supplemental agreement requiring that the ties be delivered to one of the railroad's plants outside the state for treatment. The Court held that such transactions were local upon a completed delivery in Indiana, and nonetheless interstate because the purchaser was required to deliver the ties to another state for processing.

Therefore, in view of the authorities herein discussed, and of the many other authorities cited by counsel and considered by me, I am of opinion that the local [illegible] sales by the plaintiff of natural gas produced in this State, as described in Agreed Issues Nos. 4 and 5, constitute taxable events accruing prior to any interstate movement of the product, which may, without

burden upon interstate commerce, be taxed under Section 2a.

As between Agreed Issues Nos. 4 and 5, the difference is that the natural gas involved in sales described in Issue No. 4 is transported by means of the plaintiff's pipelines into Kentucky before its sale in West Virginia, whereas the gas involved in Issue No. 5 is transported directly to the purchaser in West Virginia. In my view, the incidental transmission of the West Virginia-produced natural gas through Kentucky pipelines does not change the local character of such transmissions. The situation in the case at bar is, in principle, very similar to the case of Norfolk and Western Railway Co. v. Field, 143 W. Va. 219, wherein one of the issues involved was whether the annual privilege tax on railroads was properly measured by income derived from raiload shipments originating and ending in this State, but which moved over 5.48 miles on the taxpayer's tracks in Virginia and .28 of a mile in Kentucky. The Court, before finding that the tax did not involve an unreasonable burden on interstate commerce, said at page 232:

> "The fact that such loop traffic is technically interstate commerce, however, does not necessarily establish that the income derived therefrom does not arise from business conducted within this State."

Also, in Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192, 36 L. Ed. 672, the Supreme Court held that the taxation of receipts from the continuous carriage from one point to another within the state, though passing for a time outside the state, was constitutionally unobjectionable. Central Greyhound Lines, Inc. v. Mealey (1947), 334 U. S. 653, 92 L. Ed. 1633, relied upon by counsel for

the plaintiff, does not compel a different conclusion since, in the case at bar, the taxable event is the sale of the product in this State and not the transportation thereof within this State.

Therefore, with regard to Agreed Issues Nos. 4 and 5, I am of opinion that the Commerce Clause of the Federal Constitution does not prohibit the application of the Business and Occupation Tax to United Fuel's gross income from the wholesale sales to other gas companies in this State, for resale by them, of gas produced in this State, under either the situation described in subsection (b) of Issues 4 and 5, or the situation described in subsection (c) of Issue 4. Moreover, inasmuch as the sale of locally produced natural gas is the permissible taxable event, the temporary underground storage question, as described in subsection (a) of Agreed Issues Nos. 4 and 5, is moot. Accordingly, Agreed Issues Nos. 4 and 5, in each of the situations described by the subsections, will be answered in the negative.

Agreed Issue No. 6 involves the question of whether gas produced in this State, which is commingled with imported gas, a part or all of which is ultimately consumed in this State, should be subjected to the Business and Occupation Tax when the amount thereof can be estimated, but not measured. The plaintiff contends that the Attorney General of West Virginia has, on "previous and analogous occasions," advised the Tax Commissioner that the Business and Occupation Tax should not be applied to an indeterminate intrastate portion of the income derived from business essentially interstate in nature. The first opinion, rendered February 16, 1954, found at page 218 of the Official Opinions of the Attorney General 1952-54, dealt with the question of whether prod-

ucts partially manufactured in other states might be subjected to the Business and Occupation Tax on an apportioned basis. That issue, however, is not analogous to the issue in the case at bar inasmuch as the proceeds of the sale of locally produced and consumer gas cannot possibly be subjected to local taxation in other states. The other opinion referred to, rendered January 8, 1957 and reported at page 121 of the Official Opinions of the Attorney General, 1956-58, discussed the possibility of applying the Business and Occupation Tax to income derived from radio broadcasts which could be heard both in and out of the State. That opinion, however, would appear to support the defendant's position in the instant case, in that while it is said therein that the application of the tax to all receipts would constitute a burden on interstate commerce, the author of that opinion speculates that a satisfactory method could be devised for separating the intrastate activities from the interstate activities, which could, therefore, be subjected to the tax.

From the stipulation material (51), it appears that subject to certain enumerated limitations, the quantities of gas involved in the case can be estimated by competent and recognized engineering techniques. Such sales being sales of West Virginia gas to West Virginia consumers, as estimated by the engineering techniques referred to, and therefore being clearly within the taxing power of the State. I am of opinion that such reasonably reliable estimates should be utilized in determining the amount of the tax. Therefore, Agreed Issue No. 6 will be answered in the negative.

The next group of stipulated issues—Agreed Issues Nos. 7, 8, 9 and 10—concerns sales of natural gas to in-

dustrial customers under special contracts between the plaintiff and the consumers or purchasers. From the stipulation material and pleadings, it appears that the original assessment reported that the plaintiff had failed to report and pay taxes under Section 2d on its gross income from sales under special industrial contracts to industrial customers (as distinguished from industrial and other consumers served under plaintiff's official utility tariff, approved by the Public Service Commission) for direct consumption or use in the purchaser's business activities in West Virginia (203). This part of the original assessment was affirmed by the reassessment, though certain other tax claims, not now material, were eliminated (206), the Tax Commissioner taking the position that such sales constituted the privilege described in Section 2d as "engaging or continuing within this state in any public service or utility business" (209).

The plaintiff's primary contention with regard to Agreed Issue No. 7 is that the privilege involved in Audit Finding 4 is excluded from the operation of Section 2d by its own terms in providing:

> "x x x The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate selection or sections of this article."

The plaintiff contends that the privilege involved in Audit Finding 4 more properly comes within the operation of Section 2c, as "engaging or continuing in this state in the business of selling any tangible property whatsoever" (210).

Assigned Error 7 (corresponding to Agreed Issue No.

7) asserts that the language of Section 2d provides for the taxation of such income under another section, specifically Section 2c (213). Agreed Issue No. 7 is in the following language:

> "Does Tax Section 2d, in providing inter esse that 'The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article', thereby exclude from its measure United Fuel's gross income from sales of gas delivered in its West Virginia utility service territory to industrial customers under special industrial contracts individually negotiated (as distinguished from United Fuel's gross income from sales of gas to industrial and all other consumers who are served under its official utility tariff approved by the Public Service Commission, conceded to be taxable under Tax Section 2d) for direct consumption or use in the purchaser's business activities in West Virginia either (a) as a source of energy or (b) as a raw material ingredient or component part of a product which the purchaser manufactures for sale, and thus render such gross income taxable under Tax Section 2c as wholesale sales (as defined in Tax Section 1), on the legal conclusion that such special contract sales are not 'the supplying of public services' under the manifest legislative intent of Tax Section 2d?"

The history of special industrial contracts is described in detail in the stipulation material (217) through (340) showing the origin of such contracts (217), the distinction between industrial and utility customers (219), (221), and the circumstances and events leading to pres-

ent-day special industrial sales contracts (220), (222) and (223). As of 1961, plaintiff had fourteen special industrial contract customers (224), three of which were served directly from transmission or main lines (225). Sales of gas to E. I. du Pont de Nemours and Company (X 39) were from the plaintiff's main line (225), and consisted of 100 percent Southwest gas (240), which came directly from the Southwest in summer periods (242), and from storage in the winter periods (243). Sales to Elk Refining Company (X 42) came directly from plaintiff's main line (225), but the 1961 summer period deliveries consisted of 100 percent West Virginia gas (249) and a mixture of West Virginia, Southwest and Kentucky gas in the winter period (250). The third industrial customer, Kaiser Aluminum & Chemical Corporation, was served directly from plaintiff's transmission pipelines (X 49, 57), which received, in 1961, 100 percent directly from Southwest and Appalachian wells in the summer (261), and from storage in the winter periods (262). Monsanto Chemical Company, which was served from a distribution main (X 45), formerly purchased under plaintiff's utility tariff (264), but has subsequently converted to coal in part of its operations.

Du Pont uses the gas as a raw material in the manufacture of chemicals (227). Elk Refining Company uses the gas to fire steam boilers for the entire energy need of its refinery (245). Kaiser uses the gas in the operation of its manufacturing plant (253), (254) and (255), and Monsanto uses the gas in various capacities related to its manufacturing process (265). The above-described operations of du Pont, Elk Refining Company, Kaiser, and Monsanto demonstrate the full range of usage by all special contract industrial customers (270).

As expressed in the Stipulation of Agreed Issues (271), the plaintiff's position in this regard is, "x x x that its special contract industrial sales are private, unregulated sales of the character described by the Tax Commissioner's Regulation BOT-32 (X 126, sheets 17-18), as 'non-utility sales' to 'manufacturers' involving no aspect of United Fuel's holding out to render utility service to the public, and that this unregulated characterization of its special contract industrial sales (as distinguished from its utility tariff sales) has been fully envisioned and authorized by the official rules and regulations promulgated by the Public Service Commission as a normal and proper exercise of the Commission's discretion subject to judicial review;". The Tax Commissioner's contention is: "that United Fuel's special contract industrial sales are nothing more than a class of its regulated utility sales, representing an integral part of United Fuel's holding out to render utility service to the public throughout its service territory, and therefore that the provisions for 'non-utility sales' in Regulation BOT-32 (Exhibit 126, Sheets 17-18), are inapplicable to such special contract industrial sales."

On Agreed Issue No. 7, the plaintiff, by its brief, argues that while Chapter 24 of the Code grants to the Public Service Commission jurisdiction to regulate all sales by public utilities, the Commission has the discretion to decide whether or not a public utility can engage in private, unregulated business; that in the case at bar, the Public Service Commission has exercised its discretion in favor of allowing United Fuel to engage in special contract industrial sales as one type of the private, unregulated business. It is accordingly argued by the plaintiff that its special industrial contracts are not "the supplying of public services" within

the meaning of Section 2d, but that such services are limited to utility tariff customers. While conceding that such industrial customers could demand service under the utility tariff, the plaintiff argues that the distinction lies in the fact that they could not demand the special contracts.

The defendant's argument in this regard, stated very briefly, is that since all of the special industrial customers are located within plaintiff's utility service territory, under the statutory mandate of Code, 24-2-2 and 7, the Public Service Commission has a nondiscretionary duty to examine, approve and regulate all such sales, and that accordingly such sales constitute the supplying of public service, within the meaning of Section 2d.

Numerous cases have been cited by counsel for both parties, and by Amicus Curiae, dealing with the question of whether such sales constitute the "supplying of public services" within the meaning of Section 2d. While I have considered all of the authorities cited, I could not attempt herein to discuss each of them, but will only discuss the cases which I consider to be most significant.

One of the decisions most prominently discussed by counsel for both parties is that reported in Clarksburg Light & Heat Co. v. Public Service Commission, 84 W. Va. 638. In that case the plaintiff, by original petition to the Supreme Court of Appeals, sought suspension of an order of the Public Service Commission fixing a schedule of rates and classifications. The plaintiff, a supplier of natural gas in the City of Clarksburg, filed with the Public Service Commission a schedule of proposed rates, but before the hearing on the original objections thereto was completed, the plaintiff filed an

amended petition containing another classification and schedule of rates. The Commission made a temporary classification and rate schedule, including in "Class Three" thereof, manufacturers. The plaintiff appealed, contending that its dealings with manufacturing plants were not part of its public service, and were, therefore, not subject to the control of the Commission. The Court held that the language of the Act conferring jurisdiction upon the Public Service Commission was broad enough to embrace all the activities of the plaintiff. Also, in answering the plaintiff's contention that the Legislature did not have the power to make all of its activities subject to the regulatory power of the Commission, the Court stated that no rule could be laid down which could be followed blindly or arbitrarily over a period of time, but that, "The ever-changing conditions of modern business, and constantly varying relations of the public to such business, make necessary the extension of this power in the interest of the public to such businesses as may by their conduct decidedly influence for weal or for woe the general welfare of the community." In determining whether the plaintiff's business of furnishing gas to manufacturing enterprises so affected the interest of the community so as to bring it within the rule, the Court noted that if it were subject to public regulation in supplying its product to one class of customers, such as domestic consumers, it could not very well be conceived how the supplying of its product of other consumers in the same community could be placed upon a different footing. To the argument that the supplying of manufacturing consumers was private business, the Court noted that the argument might be applied with equal force to the supplying of every private residence in the city, reasoning that if such were the test,

then the public service would only extend to such of the petitioner's product as is furnished to purely public institutions.

The plaintiff in the Clarksburg Light and Heat Co., case, supra, also argued that the supplying of gas to the manufacturing plants was but a sale of the plaintiff's product to them. The Court said that it was more than just a sale; that it was also the delivery at the point of consumption, and that in this regard the plaintiff was a public servant. The Court concluded its discussion on that portion of the case by saying at page 649:

> "x x x We are clearly of the opinion that so long as the petitioner is engaged in supplying gas to the public in the manner in which it is at this time it cannot supply a part of that public under private contract, and a part of it under public regulation."

Also prominently discussed by counsel is the decision in Preston Light & Power Co. v. Renick, 145 W. Va. 115. That case involved a suit by the plaintiff to prohibit the Preston County Coke Company from proceeding further in a proceeding before the Public Service Commission to prohibit the Commission from asserting jurisdiction in the matter. In its petition to the Public Service Commission, the defendant Coke Company had alleged that certain rates for electricity, stipulated in an agreement between it as seller and the plaintiff as purchaser were inadequate, and asked that different rates be established by the Commission. The Commission agreed to hear the case upon finding that the defendant Coke Company was a utility under its jurisdiction.

From the pleadings and demurrer, it appeared that the defendant Coke Company, shortly after its incor-

poration in 1907, began to sell electricity to the public generally in sections of Preston County and continued to do so until 1923, when the Power Company was incorporated and organized, and the Coke Company transferred its transmission and distribution facilities to the Power Company, but continued to generate electricity and sell it to the Power Company. In 1955, a written contract, specifying the rates for the electricity generated, was entered into between the two companies. The contract was amended in 1956. In 1923 the Coke Company had applied to the Commission for permission to increase its rate, which was authorized with the provision that the applicant segregate its public utility business from its coal and coke business. Thereafter, the Commission did not exercise any regulatory authority over the electrical business of the Coke Company, nor did the Coke Company recognize or invoke the jurisdiction of the Commission. The Power Company contended that since the Coke Company supplied no one but it, the Coke Company was not a public utility since the transfer in 1924. The Court, however, after a thorough discussion of the facts and applicable authorities, concluded that the defendant Coke Company was, in fact, a public utility and as such, subject to the jurisdiction of the Public Service Commission.

In the discussion of whether the Coke Company was a public utility the Court, in the Renick case, supra, at page 126, made the following statement, which is relied on by the plaintiff as authority for its position in the case at bar:

> "x x x the conduct of other business of a private nature in addition to the rendition of a public service by a person in control of property does not divest him of his status as a public utility or

exempt him from regulation as such as to his public business. (Citing authorities.)."

In the Hutsk case, however, the private business related to was apparently the production and sale of coal [illegible] which, unlike the product involved in the case [illegible], was not its utility product. The Court then proceeded with a discussion of the contract involved. It said at page 329:

> "Though as a general rule public utilities have the right to enter into contract between themselves or with others, free from the control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties, the principle is firmly established that all contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the state of its regulatory power whenever the public interest may make it necessary; and when such contracts are the subject of statutory regulation, no contract for service may be made by a public utility except as provided by law, although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority. 73 C.J.S., Public Utilities, Section 5; 43 Am. Jur., Public Utilities and Services, Section 98."

The Court went on to say that all contracts between [illegible] utility and a consumer were subject to the power of the Legislature through the Public Service Commission, citing and discussing City of Benwood v. Public Service Commission, 75 W. Va. 127; Mill Creek Coal and Coke Company v. Public Service Commission, [illegible] W. Va. 462; United Fuel Gas Company v. Public Service Commission, 73 W. Va. 571; City of Charleston

v. Public Service Commission, 86 W. Va. 536; Mountain State Water Company v. Town of Kingwood, 121 W. Va. 66; and Union Dry Goods Company v. Georgia Public Service Corporation, 248 U. S. 372, 63 L. Ed. 309. The Court concluded by ruling that since the Coke Company was a public utility, and as such, subject to the jurisdiction of the Commission, and since the contract between the parties directly affected the cost of the public service, the Commission had the power and authority to supervise and regulate its rates.

In the very recent case of Wilhite v. Public Service Commission (W. Va. 1966), 149 S. E. 2d 273, decided after the submission of the instant case, in considering the question of what constitutes a public utility, it is said:

> "The test as to whether or not a person, firm or corporation is a public utility is that there must be a dedication or a holding out either express or implied that such person, firm or corporation is engaged in the business of supplying his or its product or services to the public as a class or any part thereof as distinguished from the serving of any particular individuals.",

citing Preston County Light & Power Co., supra, Also, the Court observed at page 283, et seq.:

> "It was held in the leading case of Clarksburg Light & Heat Company v. Public Service Commission of West Virginia, 84 W. Va. 638, 100 S. E. 551, which was a rate case, that the Clarksburg Light & Heat Company was a public utility in the furnishing of services to industrial consumers and for the rates charged therefor. This was done notwithstanding the tariff provisions saying that such industrial consumers would not be a public service. However, the decision in this case did

> not involve the part of the tariff which provides that such public utility did not have to furnish a firm supply of gas to industrial consumers."

In view of the principles enunciated in Clarksburg Light & Heat Co., supra, Renick, supra, Wilhite, supra, and many other cases cited by counsel, too numerous for discussion here, upon the agreed facts in this case, I am of opinion that the plaintiff's business dealings with the special industrial contract consumers, as described in Agreed Issue No. 7, substantially affect the public welfare or interest, and, accordingly, constitute a part of its public utility business; that, as such, the special industrial contracts are subject to regulation by the State through the Public Service Commission; and, that the evidence in this case as to the extent or lack of exercise of such power heretofore exercised by the Public Service Commission has no bearing upon the status of such business as a "public service" within the meaning of Section 2d. Therefore, I am of opinion that the gross income received by the plaintiff from sales of gas delivered in its utility service territory to industrial customers under special industrial contracts individually negotiated for direct consumption in this State does come within the meaning of Section 2d as "the supplying of public services" and is taxable thereunder. Accordingly, Agreed Issue No. 7 will be answered in the negative.

Agreed Issue No. 8 is in the following language:

> "Do the Equal Protection Clause of the 14th Amendment to the United States Constitution and Section 1, Article X of the West Virginia Constitution prohibit the higher rate of Tax Section 2d from being applied to United Fuel's gross income from special contract industrial sales made in its West Virginia utility service territory, in view of

the fact that the wholesale rate of Tax Section 2c is applied to gross income derived from unregulated sales of gas by non-utility gas companies to industrial customers?"

Upon this issue, the plaintiff urges that the discrimination is unconstitutional in the instant case inasmuch as the non-utility suppliers of the same industrial customers are being taxed at .25 percent of gross income, whereas the plaintiff is paying 3.9 percent for the same type of sales. In support of its position, the plaintiff cites and quotes from Quaker City Cab Co. v. Pennsylvania, 270 U. S. 389, 72 L. Ed. 927, involving a gross sales tax against corporations engaged in taxi business, but not against partnerships or private proprietors. In striking the tax, the Supreme Court fund that the classification was not justified inasmuch as it was not based on any real or substantial difference in the source of receipts or the situation or character of the property employed.

While recognizing the propriety of certain classifications of business for tax purposes, the plaintiff argues that "the clasification scheme of the Business and Occupation Tax is based on the business privilege exercised, and not the status of the taxpayer under the Public Service Commission Act." However, Section 2d clearly imposes the tax only "Upon any person engaging or continuing within this state in any public service or utility business x x x", the amount of which is "computed on the gross income of the business."

Having heretofore decided in Agreed Issue No. 7, that the special contract industrial sales do come within the regulatory power of the State through the Public Service Commission, I am of the further opinion that such sales are also endowed with the correlative benefits of a public

utility which, in my view, are both real and substantial. Accordingly, upon the finding that the plaintiff's business of supplying industrial consumers is substantially different in source of receipts and status of property employed from that of the private, non-utility supplier, I am of opinion that the different classifications for taxation are constitutionally unobjectionable. See Arslain v. Alderson, 126 W. Va. 880, 888; Appalachian Electric Power Co. v. Koontz, 138 W. Va. 84, 96; In Re: Tax Assessments, 137 W. Va. 673, 680; Bankers Pocahontas Coal Co. v. County Court, 135 W. Va. 174; In Re Tax Assessments, 126 W. Va. 506. Agreed Issue No. 8 will, therefore, be answered in the negative.

Agreed Issue No. 9 concerns whether the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution and Section 1, Article X of the West Virginia Constitution prohibit the application of Section 2d on plaintiff's special contract industrial sales in its West Virginia utility service territory, in view of the fact that Regulation BOT-32 "properly recognizes that a gas utility company can make (i) 'non-utility sales' of produced gas taxable only under Tax Section 2-a and (ii) 'non-utility sales' of purchased gas taxable only under Tax Section 2e, under which said Regulation BOT-32 the Tax Commissioner admits any or all of United Fuel's special contract industrial sales would be 'non-utility sales' of gas if they were made in West Virginia but outside the company's utility service territory?"

Upon this issue, I have carefully considered the authorities and argument of counsel, and am of the opinion that the classification made by the regulation, as it applies here, is proper. Industrial sales made outside of the plaintiff's utility service territory may, in my view, be

properly classified as "non-utility sales" taxable under Section 2a without unconstitutionally discriminating against special contract industrial sales made within the utility service territory inasmuch as such sales within the territory, as heretofore discussed, come within the regulation and protection of the Public Service Commission. Agreed Issue No. 9 will, therefore, be answered in the negative.

Agreed Issue No. 10 is as follows:

> "Does Tax Section 2d, in providing inter esse that 'The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States.', thereby exclude from taxation under any Tax Section of the statute United Fuel's gross income from sales of gas under special industrial contracts directly from United Fuel's transmission pipelines to—
>
> (a) E. I. du Pont de Nemours and Company,
>
> (b) Elk Refining Company, and
>
> (c) Kaiser Aluminum & Chemical Corporation
>
> in view of the particular facts, including the role of underground storage, involved in the sales and deliveries to each?"

As heretofore noted, sales of natural gas to du Pont, Elk Refining and Kaiser are made directly from transmission pipelines (331), as defined in the Uniform System of Account (225).

The primary contention of the plaintiff is that the exclusionary provision of the statute does not merely limit the application of the tax of Section 2d to sales which could be taxed without impinging upon the Commerce Clause of the Constitution, but that all sales in interstate commerce are thereby excluded. The threshold question,

therefore, is whether or not the sales involved in Agreed Issue No. 10 were in fact sales in interstate commerce.

In an effort to discover the authorities relied upon by counsel for the defendant in determining the intended extent of the statutory exclusion, I have very carefully considered the entire host of cases cited and the argument of counsel in their pre-trial and reply briefs. However, judging from the defendant's "pre-trial" brief, it was apparently not anticipated that the plaintiff's primary reliance would be that all sales in interstate commerce are, thereby expressly excluded, and not merely those sales involving interstate commerce, the taxation of which would unduly burden interstate commerce. In other words, most of the authorities cited by counsel for the defendant stand for the proposition that a state may regulate or tax comparable sales, even though they involve interstate commerce, e. g., General Motors v. Washington, 377 U. S. 436, 12 L. Ed. 2d 430, Illinois Natural Gas Co. v. Central Illinois Public Service Commission, 314 U. S. 498, 86 L. Ed. 371, Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83, 71 L. Ed. 549, Southern Natural Gas Corporation v. Alabama, supra. Other authorities cited by counsel for the defendant support a state's taxing or regulating authority based upon local retail distribution of gas from service lines, e. g., Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. Ed. 577, Memphis Natural Gas Co. v. McCanless, (Tenn. 1944) 177 S. W. 2d 841, while others, cited purely upon the question whether such sales are made in interstate commerce, appear to support the plaintiff's view, Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 64 L. Ed. 434, Missouri, ex rel. Barrett v. Kansas Natural Gas Co., 265 U. S. 298, 68 L.

Ed. 1027, and Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 92 L. Ed. 1832.

Upon consideration of the authorities cited, and of others, summoned by me, I am of opinion that the sales of out-of-state gas, made by the plaintiff to duPont, Kaiser and Elk Refining, directly from transmission lines, were sales in interstate commerce. Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U. S. 507, 92 L. Ed. 123; Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission 341 U. S. 329, 95 L. Ed. 993; see also, East Ohio Gas Co. v. Tax Commissioner, 283 U. S. 465, 75 L. Ed. 1171, State Tax Commission v. Interstate Natural Gas Co., 284 U. S. 41, 76 L. Ed. 156.

Thus, the determinative question upon Agreed Issue No. 10 is whether such sales in interstate commerce come within the exclusion of Section 2d, which provides that the measure of the tax "shall not include gross income derived from commerce between this state and other states of the United States." The defendant relies, to a great extent, upon the opinion in Norfolk and Western Railway Co. v. Field, 143 W. Va. 219, wherein, in referring to the underscored portions of the following statutory language of Code, 12A-11-2 (Michie, 1955):

> "It is the purpose of this section to levy a privilege tax upon railroad corporations for the privilege of engaging in business conducted *entirely within this State, and it is not intended to impose any tax or charge upon interstate or foreign commerce.* x x x." (Emphasis supplied),

the Court said at page 228:

> "x x x Consideration of the phases, in their proper setting, we think, makes it clear that the Legislature was simply saying that the privilege tax

should not be measured by income earned in some other state. x x x."

It is to be noted, however, that in the Norfolk and Western Railway Co. case, Id., while the constitutionality of Section 5(b) was not directly challenged, the Court, in connection with Section 2 of the same article held, upon the facts in that case, that the assessment was proper inasmuch as the tax of Sections 2 and 5 was imposed on the privilege of doing business in the State, even though the measure of the tax, in part, was affected by the interstate business done within the borders of the State. However, in the recent case of Battle v. Baltimore & Ohio R. R. Co., 149 W.Va. 810, Section 5(b), as applied to the taxpayer in that case, was held to constitute an unreasonable burden upon interstate commerce, and was to that extent, declared invalid. Judge Haymond, in the opinion, in making some comparative observation between the provisions of Section 4 (expressly limiting the application of the privilege tax to income from intrastate business) and the provision of Section 5(b), said at page 818, et seq.:

> "It is clear from these words of the instant statute 'The tax x x x shall be equal to four per cent of the net income earned within the State, x x x measured in ton-miles,' that the income earned within the State and subject to the tax is income or receipts derived from both the intrastate business and the interstate business engaged in by the defendent in West Virginia. It is significant that the language of Section 4, Article 12A, Chapter 11, Code, 1931, as amended x x x imposing a normal annual privilege tax for the privilege of doing business in this State, unlike Section 5(b) which does not do so, expressly provides that the tax shall be equal to the gross income from all business beginning and ending within the State multiplied by the particular rates fixed for each of such carriers

> The language of Section 4 makes it clear that the tax is imposed solely upon the intrastate business of those carriers, whereas the language of Section 5(b), relating to railroad corporations, by the use of different terminology, necessarily imposes the tax upon the net income derived from both the intrastate business and the interstate business of such corporation. x x x."

Moreover, at page 821 of the opinion, Judge Haymond recited the rule that:

> "According to numerous cases, the only method of determining a valid privilege tax imposed by a statute is to segregate the net income of the intrastate business of the defendant in this State from the net income of its interstate business in this State and to subject only the net income derived from its purely intrastate business to such tax x x x."

In light of the decision in Battle v. Baltimore & Ohio R. R. Co., supra, indicating, in my view, a broader application of the Commerce Clause, and of the decisions from other states, construing similar excluder clauses, and upon the clear mandate of the excluder of Section 2d, I am of opinion that the statute must be literally applied to exclude from the computation of the taxes, not only sales in interstate commerce which would, if taxed, clearly constitute an unreasonable burden thereon under the Constitution, but all gross income from any transaction in interstate commerce. See American Bridge Co. v. Smith, 352 Mo. 616, 179 S. W. 2d 12, United Gas Pipeline v. Mississippi Public Service Commission, 41 Pur. 3d 145, 133 So. 2d 521, Texas Gas Transportation Corp. v. Mississippi Public Service Commission, 41 Pur. 3d 307, 133 So. 2d 526. Accordingly, having heretofore found that the transmission pipeline sales involved in

Agreed Issue No. 10 are sales involving interstate commerce, I am of opinion that Agreed Issue No. 10 should be answered in the affirmative. The question of whether the temporary storage of the gas supplied under such special contracts terminates the interstate aspect of the transmission has heretofore been ruled on by me in Agreed Issue No. 2, and upon the reasons therein stated, I am of opinion that such storage does not affect the interstate character of sales involved in Agreed Issue No. 10.

Agreed Issue No. 11, concerning the taxability under Section 2h of the plaintiff's gross income arising out of the performance of certain exchange and transportation agreements with Cabot Corporation and Gas Transport, Inc. would not, upon the record in this case, appear to require a decision. The Notice of Appeal, Part Four (B), page 37, states that the amount of additional taxes claimed is $348.38. However, from the stipulation material (348) it appears that the amount involved was paid in the year 1961 and does not now represent a claim for a refund. Therefore, inasmuch as this issue does not relate to any present claim or justiciable controversy, but is merely indicative of possible future disputes, I do not believe that a decision upon this issue would be proper.

Agreed Issue No. 12 is in the following language:

> "Assuming arguendo that United Fuel failed to remit in whole or in part the proper amount of tax, was such failure by United Fuel due to 'reasonable cause' within the meaning of Tax Section 11, so that the Tax Commissioner should have waived such penalties unconditionally instead of providing in the Reassessment that 'upon payment of said $897,167.37 in taxes, as such, within thirty (30) days from date of your receipt of my

said ruling, then, the said penalties, as such, will be waived?"

Under Code, 11-13-11 the assessment of penalties for failure to make a return or remit the proper amount of tax is required. However, that section further provides that "if such failure is due to reasonable cause, the tax commissioner may waive or remit in whole or in part these penalties." The defendant takes the position that a determination of "reasonable cause" lies within the discretion of the Tax Commissioner, and should not be disturbed upon judicial review in the absence of some showing of abuse of that discretion. 2 Am. Jur. 2d, Administrative Law, §§ 650, 651 and 652, page 502, et seq. Thacker v. Crow, 141 W.Va. 361, and the decision of this Court in Eaton Coal Company v. Battle, memorandum of opinion dated February 4, 1966, and now pending in the Supreme Court of Appeals upon appeal and supersedeas granted July 11, 1966.

The plaintiff contends that under Section 8, requiring this Court to "hear the appeal in equity (deleted in 1963) and determine anew all questions submitted to it on appeal from the determination of the tax commissioner", all questions of the tax liability, as well as that of waiver and penalties, should be tried de novo, as if never decided by the Tax Commissioner. I am, however, of opinion in conformity with my former ruling in the Eaton case, that the waiver of penalties is not one of the questions to be determined anew upon judicial review, but rather, is a determination within the sound discretion of the Tax Commissioner, reviewable only upon the issue of abuse of such discretion. As I interpret Section 8, this Court is empowered to hear and determine anew only judicial questions "such as the validity of the assessment of the tax and the applicability of the section of the statute

tiff cites Jewel Tea Co. v. State Tax Commissioner, 70 N. D. 229, 293 N.W. 386, in which the court held, under a similar penalty statute, that where the exemption in question had, for many years, been claimed by the taxpayer and acceded to by the commissioner, the taxpayer's failure to pay the tax was excusable and the penalty should not have been inflicted; nor should such penalty have been inflicted because of the taxpayer's resort to judicial review, saying:

> "We realize that primarily it is discretionary with the Commissioner to excuse non-payment within the time required by the statute; but this is not an arbitrary discretion. Where the failure is clearly attributable to the passive acquisition of the Commissioner in the claim, it would be unjust to impose the penalty as it would be to impose a penalty for delay caused by an appeal."

Another case cited by the plaintiff is In Re Abbott's Estate, 213 Minn. 289, 6 N. W. 2d 466, wherein the court, upon finding that the taxpayer had relied upon an earlier administrative ruling of the tax commissioner, held that the taxpayer was entitled to a waiver of penalties, saying that it would be "unjust and inequitable" to enforce the penalties.

While it would appear to be impossible to determine from the prior tax returns and audit reports exhibited in this record, the extent to which transactions similar to those involved in the instant proceeding were considered by the then tax commissioner, it is evident that the operations of the plaintiff prior to the audit reports did involve many of the activities involved in this appeal, and were not subjected to like taxation. Clearly, in such circumstances, it would have been within the province of the Tax Commissioner's discretion to waive the penalties, which, in effect,

the Commissioner did, but upon the condition heretofore noted. In other words, as I view the reassessment notice, a finding that the plaintiff's failure to remit the taxes was due to a reasonable cause (a prerequisite in any case under Code, 11-13-11) was made by the Tax Commissioner, but as an indcement to the prompt payment of all the taxes asserted by the reassessment, for reasons not disclosed by this record, the waiver was available to the plaintiff only upon full payment within thirty days. Clearly for the reasons given in Jewel Tea Co., supra, and upon basic concepts of justice with regard to the right to petition the courts without fear of intimidation or penalty, it would, in my opinion, be an abusive exercise of the Commissioner's discretion to utilize the waiver provision of Section 11 as a means of discouraging or thwarting judicial review. Also, it could not reasonably be contended that the action of the Commissioner was justified in this case as a means of securing payment of taxes finally determined by him to be due and owing. Adequate security for the payment of such taxes is provided by Section 8, requiring bond in the amount of the taxes and penalties appealed from, or sufficient properties owned by the taxpayer and subject to the liens imposed by Sections 12 and 14. I am therefore of opinion that the proffered waiver of penalties by the Commissioner was, in effect, a finding that the plaintiff's failure to remit taxes was due to reasonable cause, that such assumed finding was justified, but that the condition imposed thereon (payment within thirty days) was unreasonable, and was an abuse of authority under Section 11. Accordingly, Agreed Issues Nos. 12 and 13 will be answered in the affirmative.

The final agreed issue, No. 14, is in the following language:

> "In view of the facts that (i) the Tax Commissioner served the Original Assessment on United Fuel on December 13, 1963, (ii) United Fuel filed the Petition for Reassessment with the Tax Commissioner on January 9, 1964, (iii) the Tax Commissioner served the Reassessment on United Fuel on May 26, 1965, and (iv) United Fuel served the Notice of Appeal on the Tax Commissioner on June 24, 1965, did the Tax Commissioner fail to cause 'an action of process to collect' taxes to be 'brought or issued within five years after' the due date for 1958 taxes, (being in this case February 28, 1959, due to an extension granted by the Tax Commissioner) within the meaning of Chapter 55, Article 2, Section 19a, West Virginia Code 1931, as amended(."

The plaintiff's position is that since under Section 13 of the Business and Occupation Tax, the Commissioner is given the power to commence an action to collect the taxes claimed to be due, his resort to the alternative assessment procedures of Section 7 does not prevent the application of Code 55-2-19a providing:

> "Every action or process to collect any tax x x x, interest and penalty due the state or any subdivision thereof shall be brought or issued within five years next after the date on which the taxpayer is required by the statute or ordinance imposing the tax, interest and penalty to file a return and pay the tax due thereunder x x x."

The defendant's assertion upon this point is that "the issuance of the assessment of tax deficiency by the State Tax Commissioner would itself constitute the action or process referred to in Section 19a as a means by which the statute of limitation was to be stopped", citing several authorities from other states variously referring to administrative proceedings as "actions, cases, proceedings

special proceedings, summary proceedings, proceedings at law, proceedings in court, proceeding in rem, suits, or trials."

Upon careful consideration of Code, 55-2-19a, and of all sections of Article 13, Chapter 11, Code, it appears that counsel for both parties have, perhaps, gone somewhat afield in their approach to this issue. While Code, 55-2-19a requires that any action for the collection of taxes be brought within five years after such taxes becomes due and payable, where, under Code, 11-13-7, et seq., a dispute arises over insufficiently returned taxes, the time for payment thereof is fixed by the Business and Occupation Tax article, independently of Code, 55-2-19a. It is also true, as asserted by counsel for the plaintiff, that it is discretionary with the Commissioner as to whether he will, in the first instance, initiate an investigation for a determination of insufficiently returned taxes under Section 7. However, once he properly invokes this section and makes an assessment thereunder, the procedure for a final determination of the tax liability is, in my view, fixed by the following sections of the Business and Occupation Tax article, unaffected by Code, 55-2-19a. This view is evident upon reading all of the pertinent sections of the Business and Occupation Tax article. Initially, Sections 4 and 5 prescribe the time for payment of taxes due and payable, upon the computations of the taxpayer. Under Section 7, however, if the Tax Commissioner believes that the return is incomplete, deficient or otherwise erroneous, he is authorized to investigate and make an assessment. Accordingly, upon notice of such original assessment, the taxpayer may, under Section 7b, accede to the assessment by failing to give notice of objections within thirty days, at which time the assessment shall be

conclusive and the amount shall be payable, or, the taxpayer may, under the same section, petition the Tax Commissioner for reassessment, in which case the Commissioner is required to conduct a hearing and give written notice of his decision, which decision is final unless an appeal is taken within thirty days under Section 8. As heretofore noted, under Section 8 the taxpayer is required to produce a performance bond or other security to insure the payment of the taxes involved. It would therefore appear that under the provisions of the Business & Occupation Tax article, a timely assessment by the State Tax Commissioner under Section 7 would initiate the process of determining and fixing tax liability, independently of the limitation period prescribed by Code, 55-2-19a. As was said by Judge Haymond in the case of Walter Butler Building Co. v. Soto, supra, in comparing the declaratory judgment procedure to the appeal from the Tax Commissioner's assessment under Section 8:

> "x x x In a declaratory judgment proceeding the taxpayer institutes a suit against the State Tax Commissioner to determine the validity of an assessment of a tax against the taxpayer and his liability to pay the tax. In taking the appeal provided by Section 8 of the statute the taxpayer proceeds against the State Tax Commissioner in the manner prescribed by Sections 7b and 8. The object and the purpose of each proceeding are to enable the taxpayer to controvert and present his defense against a tax previously assessed against him by the State Tax Commissioner which if valid and not challenged in either proceeding will become final and render him liable for its payment. The identical issue to be determined in each proceeding is the validity of the assessment of the tax

and the *liability of the taxpayer to pay the tax.*" (Emphasis supplied.)

Upon the facts in this case, I am of opinion that the assessment procedure initiated by the Tax Commissioner was timely. Accordingly, I am of opinion that the collection of such 1958 taxes hereinbefore determined by me to be due and owing under the reassessment, is not barred by Code, 55-2-19a. Notwithstanding the wording of Agreed Issue No. 14, fixing the due date upon such taxes as February 28, 1959, I find against the plaintiff and for the defendant on the correlative assigned error (Assigned Error 12) which, in effect, should answer Agreed Issue No. 14 in the negative.

Counsel should prepare and present for entry an order carrying into effect the various rulings contained herein. Such order should make the necessary computations as to the amount of taxes due, and should be agreed to by counsel. Said order should likewise make this memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary.

This, January 24, 1967.

s/FRANK L. TAYLOR
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

No. ———

IN THE

Supreme Court of the United States

UNITED FUEL GAS COMPANY, a corporation,
Appellant,

v.

CHARLES H. HADEN, II,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

APPENDIX B
STATUTES INVOLVED

INTRODUCTORY NOTE

This proceeding involves a tax assessment under the West Virginia Business and Occupation Tax covering the tax years from 1957 through 1961. The Legislature of West Virginia twice amended the Business and Occupation Tax during this period, so that the Questions Presented may be thought to apply to three situations, i.e., (i) the statutes in effect from January 1, 1957,

through June 30, 1958, (ii) the statutes in effect from July 1, 1958, through June 30, 1959, and (iii) the statutes in effect from July 1, 1959, through December 31, 1961.

Although United Fuel does not believe that the Questions Presented require such tripartite consideration, the first three parts of Appendix B set out the Statutes Involved (other than assessment and appeal procedure) in each of the three time periods listed above.

Part Four of Appendix B sets out the assessment and appeal procedure in the State tribunals, as effective during all proceedings below.

PART ONE

STATUTES INVOLVED FROM JANUARY 1, 1957, THROUGH JUNE 30, 1958

W. VA. CODE 1931, c. 11, art. 13, § 1, as amended by W. VA. ACTS 1955, c. 165 (pp. 481-82):*

Section 1. *Definitions.*—When used in this article, the term "person" or the term "company", herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

"Tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commissioner to use same as the tax period in lieu of the calendar year.

* This statute is also reprinted as MICHIE'S W. VA. CODE OF 1955, vol. 1, § 959 (pp. 479-80).

"Sale", "sales" or "selling" includes any transfer of the ownership of, or title to, property, whether for money or in exchange for other property.

"Taxpayer" means any person liable for any tax hereunder.

"Gross income" means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expense whatsoever.

"Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

The terms "gross income" and "gross proceeds of sales" shall not be construed to include (1) cash discounts allowed and taken on sales; (2) the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; or (3) the amount allowed as "trade-in value" for any article accepted as part payment for any article sold.

"Business" shall include all activities engaged in or caused to be engaged in with the object of gain or eco-

nomic benefit, either direct or indirect. "Business" shall not include a casual sale by a person who is not engaged in the business of selling the type of property involved in such casual sale. "Business" shall include the production of natural resources or manufactured products which are used or consumed by the producer or manufacturer.

"Service business or calling" shall include all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include persons engaged in manufacturing, compounding or preparing for sale, profit, or commercial use, articles, substances, or commodities which are owned by another or others, as well as persons engaged as independent contractors in producing natural resource products for persons required to pay the tax imposed by section two-a of this article.

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-a of this chapter; (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the state of West Virginia, its institutions or political subdivisions.

"Contracting" shall include the furnishing of work, or both materials and work, in the fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure,

or any part thereof, or for the alteration, improvement or development of real property.

W. VA. CODE 1931, c. 11, art. 13, § 2, as amended by W. VA. ACTS 1955, c. 165 (pp. 483-84):*

Sec. 2. *Imposition of Privilege Tax.*—There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-j inclusive, of this article.

If any person liable for any tax under sections two-a or two-b shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character

* This statute is also reprinted as MICHIE'S W. VA. CODE OF 1955, vol. 1, § 960 (pp. 480-81).

where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b of this article, except in the case of production of natural gas, shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a or two-b of this article and engaging in the business of selling his natural resources or manufactured products at retail in this state shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this state. But any person exercising any privilege taxable under section two-a or two-b of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c of this article.

Manufacturers exercising any privilege taxable under section two-b of this article shall not be required to pay the tax imposed in section two-c of this article for the privilege of selling their manufactured products for delivery outside of this state, but the gross income derived from the sale of such manufactured products outside of this state shall be included in determining the measure of the tax imposed on such manufacturer in section two-b.

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a, and using or consuming the same in his business, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe.

W. VA. CODE 1931, c. 11, art. 13, § 2-d, as amended by W. VA. ACTS 1955, c. 165 (pp. 486-87):*

Sec. 2-d. *Public Service or Utility Business.*—Upon any person engaging or continuing within this state in any public service or utility business, except railroad, railroad car, express, pipe line, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one per cent; water companies, four per cent, except as to income received by municipally owned water plants; electric light and power companies, four per cent on sales and demand charges for

* This statute is also reprinted as MICHIE'S W. VA. CODE OF 1955, vol. 1, § 960(4) (p. 483).

domestic purposes and commercial lighting and three per cent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same; natural gas companies, three per cent on the gross income, said gross income for this purpose to be determined by deducting from gross income from all sales of gas to consumers the amount of the tax paid by the taxpayer under section two-a of this article on the production of the same gas; toll bridge companies, three per cent; and upon all other public service or utility business, two per cent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed under the appropriate section or sections of this article.

W. VA. CODE 1931, c. 11, art. 13, § 3-a, enacted by W. VA. ACTS 1939, c. 120 (p. 557):*

Sec. 3-a. *Surtaxes; Businesses Exempt.* Every person taxable under sections two-a, two-b, two-c, two-d and two-g of this article shall pay, in addition to that tax, and all other taxes, an additional surtax of three-tenths of each tax imposed by such sections.

The surtax imposed by this section shall not apply to:

(1) Water companies;

(2) Privileges taxed under section two-c except in the case of wholesalers or jobbers.

* This statute is also reprinted as MICHIE'S W. VA. CODE OF 1955, vol. 1, § 961(1) (p. 985).

W. VA. CODE 1931, c. 11, art. 13, § 3-b, as amended by W. VA. ACTS 1955, c. 166 (p. 497):*

Section 3-b. *Definitions; Reduction Allowed in Tax Due; How Computed.*—When used in this section the phrase "normal tax" shall mean the tax computed by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article.

When used in this section the term "surtax" shall mean the tax computed by the application of the tax rate as set forth in section three-a of this article.

When used in this section the phrase "total net balance of taxes due" shall mean the total of the normal tax in those classifications under which only a normal tax is imposed, and the total of the normal tax and the surtax in those classifications under which both a normal tax and surtax is imposed, and the combined total of all taxes when the tax return shows taxes due under more than one classification as set forth in sections two-a to two-j, inclusive, of this article, and section three-a of this article, less exemption at the rate of fifty dollars annually or at the rate of four dollars and sixteen cents per month for the period actually engaged in business.

For the period commencing July one, one thousand nine hundred fifty-five, and thereafter, a reduction of five per cent of the total net balance of taxes due is allowed. The normal tax shall be computed by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article. The surtax shall be computed by the application of the tax rate as set forth in section three-a of this article. The total net

* This statute is also reprinted as MICHIE'S W. VA. CODE OF 1955, vol. 1, § 961(2) (pp. 985-86).

balance of taxes due shall be reduced by the five per cent credit allowed herein. The total net balance of taxes due reduced by the five per cent credit is the amount of the tax payable.

PART TWO

STATUTES INVOLVED FROM JULY 1, 1958, THROUGH JUNE 30, 1959

W. VA. CODE 1931, c. 11, art. 13, § 1, as amended by W. VA. ACTS 1955, c. 165 (pp. 481-82)

This statute has been reprinted *supra*, pp. 138a-141a.

W. VA. CODE 1931, c. 11, art. 13, § 2, as amended by W. VA. ACTS 1955, c. 165 (pp. 483-84)

This statute has been reprinted *supra*, pp. 141a-143a.

W. VA. CODE 1931, c. 11, art. 13, § 2-d, as amended by W. VA. ACTS, c. 165 (pp. 486-87)

This statute has been reprinted *supra*, pp. 143a-144a.

W. VA. CODE 1931, c. 11, art. 13, § 3-a, enacted by W. VA. ACTS 1939, c. 120 (p. 557)

This statute has been reprinted *supra*, p. 144a.

W. VA. CODE 1931, c. 11, art. 13, §3-b, as amended by W. VA. ACTS 1958, c. 17 (pp. 1005-06):*

Section 3-b. *Definitions; Reduction Allowed in Tax Due; How Computed.*—This bill is enacted for the purpose of providing revenue for the administration of Senate Bill No. 34, regular session, one thousand nine hundred fifty-eight. When used in this section the phrase

* This statute is also reprinted as MICHIE'S W. VA. CODE OF 1955, 1958 Cumulative Supplement, § 961 (2) (pp. 31-32).

"normal tax" shall mean the tax computed by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article.

When used in this section the term "surtax" shall mean the tax computed by the application of the tax rate as set forth in section three-a of this article.

When used in this section the phrase "total net balance of taxes due" shall mean the total of the normal tax in those classifications under which only a normal tax is imposed, and the total of the normal tax and the surtax in those classifications under which both a normal tax and surtax is imposed, and the combined total of all taxes when the tax return shows taxes due under more than one classification as set forth in sections two-a to two-j, inclusive, of this article, and section three-a of this article, less exemption at the rate of fifty dollars annually or at the rate of four dollars and sixteen cents per month for the period actually engaged in business.

For the period commencing July one, one thousand nine hundred sixty, and thereafter, a reduction of five per cent of the total net balance of taxes due is allowed. The normal tax shall be computed by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article. The surtax shall be computed by the application of the tax rate as set forth in section three-a of this article. For the period commencing July one, one thousand nine hundred sixty, the total net balance of taxes due shall be reduced by the five per cent credit allowed herein. The total net balance of taxes due, for the period commencing on the aforesaid date, reduced by the five per cent credit is the amount of the tax payable.

PART THREE

STATUTES INVOLVED FROM JULY 1, 1959, THROUGH DECEMBER 31, 1961

W. VA. CODE 1931, c. 11, art. 13, § 1, as amended by W. VA. ACTS 1959, c. 167 (pp. 541-43):*

Section 1. *Definitions.*—When used in this article, the term "person" or the term "company", herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

"Tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commissioner to use same as the tax period in lieu of the calendar year.

"Sale", "sales" or "selling" includes any transfer of the ownership of, or title to, property, whether for money or in exchange for other property.

"Taxpayer" means any person liable for any tax hereunder.

"Gross income" means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees or other emoluments however designated and without any de-

* This statute is also reprinted as W. VA. CODE ANNO., §11-13-1 (Michie ed. 1966, vol. 4, pp. 240-41).

ductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expense whatsoever.

"Gross proceeds of sales" means the value, whether in money or other property, actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind.

The terms "gross income" and "gross proceeds of sales" shall not be construed to include (1) cash discounts allowed and taken on sales; (2) the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; (3) the amount allowed as "trade-in value" for any article accepted as part payment for any article sold; or (4) excise taxes imposed by this state.

"Business" shall include all activities, engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" shall not include a casual sale by a person who is not engaged in the business of selling the type of property involved in such casual sale. "Business" shall include the production of natural resources or manufactured products which are used or consumed by the producer or manufacturer.

"Service business or calling" shall include all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but shall not include the services rendered by an employee to his employer. This term shall include persons engaged in manufacturing, compounding or preparing for sale, profit, or commercial use, articles, substances,

or commodities which are owned by another or others, as well as persons engaged as independent contractors in producing natural resource products for persons required to pay the tax imposed by section two-a of this article.

"Selling at wholesale" or "wholesale sales" shall mean and include: (1) Sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article or by article twelve-a of this chapter; (3) sales of any tangible personal property to the United States of America, its agencies and instrumentalities or to the state of West Virginia, its institutions or political subdivisions.

"Contracting" shall include the furnishing of work, or both materials and work, in the fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property.

W. VA. CODE 1931, c. 11, art. 13, § 2, as amended by W. VA. ACTS 1955, c. 165 (pp. 483-84):*

Sec. 2. *Imposition of Privilege Tax.*—There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-j inclusive, of this article.

* This statute is also reprinted as W. VA. CODE ANNO., §11-13-2 (Michie ed. 1966, vol. 4, pp. 242-43).

If any person liable for any tax under sections two-a or two-b shall ship or transport his products or any part thereof out of the state without making sale of such products the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in said sections, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and uniform rules for ascertaining such value.

In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Gross income included in the measure of the tax under sections two-a and two-b of this article, except in the case of production of natural gas, shall neither be added nor deducted in computing the tax levied under the other sections of this article.

A person exercising any privilege taxable under sections two-a or two-b of this article and engaging in the business of selling his natural resources or manufactured products at retail in this state shall be required

to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c of this article for the privilege of engaging in the business of selling such natural resources or manufactured products at retail in this state. But any person exercising any privilege taxable under section two-a or two-b of this article and engaging in the business of selling his natural resources or manufactured products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c of this article.

Manufacturers exercising any privilege taxable under section two-b of this article shall not be required to pay the tax imposed in section two-c of this article for the privilege of selling their manufactured products for delivery outside of this state, but the gross income derived from the sale of such manufactured products outside of this state shall be included in determining the measure of the tax imposed on such manufacturer in section two-b.

A person exercising privileges taxable under the other sections of this article, producing coal, oil, natural gas, minerals, timber or other natural resource products the production of which is taxable under section two-a, and using or consuming the same in his business, shall be deemed to be engaged in the business of mining and producing coal, oil, natural gas, minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of the business showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding

as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers, which rules the tax commissioner shall prescribe.

W. VA. CODE 1931, c. 11, art. 11, § 2-d, as amended by W. VA. ACTS 1959, c. 167 (p. 545):*

Sec. 2-d. *Public Service or Utility Business.*—Upon any person engaging or continuing within this state in any public service or utility business, except railroad, railroad car, express, pipe line, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and three-tenths per cent; water companies, four per cent except as to income received by municipally-owned water plants; electric light and power companies, five and two-tenths per cent on sales and demand charges for domestic purposes and commercial lighting and three and nine-tenths per cent on sales and demand charges for all other purposes, except as to income received by municipally-owned plants producing or purchasing electricity and distributing same; natural gas companies, three and nine-tenths per cent on the gross income, said gross income for this purpose to be determined by deducting from gross income from all sales of gas to consumers the amount of the tax paid by the taxpayer under section two-a of this article on the production of the same gas; toll bridge companies, three and nine tenths per cent; and upon all other public service or utility business,

* This statute is also reprinted as W. VA. CODE ANNO., §11-13-2d (Michie ed. 1966, vol. 4, pp. 249-50).

two and six-tenths per cent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

W. VA. CODE 1931, c. 11, art. 13, § 3-b, as amended by W. VA. ACTS 1959, c. 167 (p. 547):*

SEC. 3-b. *Definitions; Reduction Allowed in Tax Due; How Computed.*—When used in this section, the phrase "normal tax" shall mean the tax computed by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article, less exemption at the rate of fifty dollars annually or at the rate of four dollars and sixteen cents per month for the period actually engaged in business.

The normal tax shall be computed by the application of rates against values or gross income as set forth in sections two-a to two-j, inclusive, of this article.

PART FOUR

STATUTES INVOLVED IN THE PROCEDURE OF ASSESSMENTS AND APPEALS

W. VA. CODE 1931, c. 11, art. 13, § 7, as amended by W. VA. ACTS 1955, c. 165 (pp. 490-91):**

SEC. 7. *Assessment of Tax When Insufficiently Returned.*—If the tax commissioner believes that the tax

* This statute is also reprinted as W. VA. CODE ANNO., §11-13-3b (Michie ed. 1966, vol. 4, p. 256).

** This statute is also reprinted as W. VA. CODE ANNO., §11-13-7 (Michie ed. 1966, vol. 4, p. 258).

imposed by this article is insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability of the taxpayer and make an assessment therefor.

W. VA. CODE 1931, c. 11, art. 13, § 7-b, as amended by W. VA. ACTS 1962, c. 28 (pp. 1158-59):*

Section 7-b. *Notice of Assessment; Petition for Reassessment; Hearing.*—The tax commissioner shall give to the taxpayer written notice of any assessment made pursuant to this article. Unless the taxpayer to whom a notice of assessment is directed shall, within thirty days after service thereof (except in the case of jeopardy assessments), either personally or by certified mail, file with the tax commissioner a petition in writing, verified under oath by said taxpayer or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of the assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be payable at the end of the thirty-day period. In every case where a petition for reassessment as above described is filed, the tax commissioner shall assign a time and place for the hearing of same and shall notify the petitioner of such hearing by written notice at least twenty days in advance thereof and such hearing shall be held within sixty days from the filing of the petition for reassessment unless continued by agreement or by the tax commissioner for good cause. The hearing shall be in-

* This statute is also reprinted as W. VA. CODE ANNO., §11-13-7b (Michie ed. 1966, vol. 4, pp. 258-59).

formal and may be conducted by an examiner designated by the tax commissioner. At such hearing evidence may be offered to support the assessment or to prove that it is incorrect. After such hearing the tax commissioner shall, within a reasonable time, give notice in writing of the decision. Unless an appeal is taken within thirty days from service of this notice, the tax commissioner's decision shall be final.

W. VA. CODE 1931, c. 11, art. 13, § 8, as amended by W. VA. ACTS 1963, c. 182 (pp. 843-44):*

Section 8. *Appeal.*—An appeal may be taken by the taxpayer to the circuit court of the county in which the activity taxed was engaged, or in which the taxpayer resides, or in the circuit court of Kanawha county, within thirty days after he shall have received notice from the tax commissioner of his determination as provided in section seven-b.

The appeal shall be taken by written notice to the tax commissioner and served as an original notice. When said notice is so served it shall, with the return thereon, be filed in the office of the clerk of the circuit court and docketed as other cases with the taxpayer as plaintiff and the tax commissioner as defendant. Before the appeal is heard, the plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by said clerk, the penalty of the bond to be not less than the total amount of the tax and penalties appealed from, and conditioned that the plaintiff shall perform the orders of the court; except that in lieu of said bond, the tax commissioner may upon a proper showing find and certify to said clerk that the properties

* This statute is also reprinted as W. VA. CODE ANNO., §11-13-8 (Michie ed. 1966, vol. 4, pp. 259-60).

of the plaintiff subject to the liens imposed by sections twelve and fourteen of this article are adequate to secure the performance of the orders of the court.

The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner. In such appeal a certified copy of the tax commissioner's assessment shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of this article. The court shall render its decree thereon and a certified copy of said decree shall be filed by the clerk of said court with the tax commissioner who shall then correct the assessment in accordance with said decree. An appeal may be taken by the taxpayer or the tax commissioner to the supreme court of appeals of this state.

SUPREME COURT, U. S.

OCT 15 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 617

UNITED FUEL GAS COMPANY,
a corporation,
Appellant,

vs.

CHARLES H. HADEN II,
Tax Commissioner of West Virginia,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

WILLIAM F. CARROLL
Assistant Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia 25305
Counsel for Appellee

Of Counsel

CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia
Room 26, State Capitol
Charleston, West Virginia 25305

TABLE OF CONTENTS

	Page
MOTION TO DISMISS OR AFFIRM	1
OPINIONS BELOW	2
RECORD REFERENCES	2
I	
THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE	3
A. The Statute	3
B. The Proceedings Below	4
C. The Nature of Appellant's Business Activities	7
II	
ARGUMENT	10
1. This case is not within the appeal jurisdiction of this Court.	10
2. The federal question which the appellant seeks to have reviewed was neither timely nor properly raised by appellant nor expressly passed on by the courts below.	11
3. The decision of the Supreme Court of Appeals of West Virginia is clearly correct and no substantial federal question is presented in this appeal.	18
CONCLUSION	20

TABLES OF AUTHORITY

TABLE OF CASES

Page

Anonymous Nos. 6 and 7 v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157, 3 L. ed. 2d 1234 (1959); 11

Charleston Federal Savings & Loan Association, et als. v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. ed. 857 (1945); 10, 17

East Ohio Gas Co. v. *Tax Commission of Ohio*, 283 U. S. 465, 51 S. Ct. 499, 75 L. ed. 1171 (1931); 19

El Paso Electric Co. v. *Calvert, et al.*, 385 S. W. 2d 542 (Tex. 1965) appeal dismissed per curiam, 382 U. S. 18, 86 S. Ct. 89, 15 L. ed. 2d 15; 20

Hiawassee River Power Co. v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 40 S. Ct. 330, 64 L. ed. 601 (1920); 17

Illinois Natural Gas Co. v. *Central Illinois Public Service Company*, 314 U. S. 498, 62 S. Ct. 384, 86 L. ed. 371 (1942); 18

Ker v. *California*, 374 U. S. 23, 83 S. Ct. 1623, 10 L. ed. 2d 726 (1963); 17

Missouri ex rel. Barrett v. *Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027 (1924); 19

Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U. S. 507, 68 S. Ct. 190, 92 L. ed. 128 (1947); 18, 19

Pennsylvania Gas Co. v. *Public Service Commission*, 252 U. S. 23, 40 S. Ct. 279, 64 L. ed. 434 (1920); 19

Page

Public Utilities Commission for the State of Kansas v. *Landon*, 249 U. S. 236, 39 S. Ct. 268, 63 L. ed. 577 (1919); 19

Public Utilities Com. v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 S. Ct. 297, 71 L. ed. 549 (1927); 19

Raley v. *Ohio*, 360 U. S. 423, 79 S. Ct. 1257, 3 L. ed. 2d 1344 (1959); 17

Rohr Aircraft Corp. v. *County of San Diego*, 362 U. S. 628, 80 S. Ct. 1050, 4 L. ed. 2d 1002 (1960); 10

Slagle v. *State of Ohio*, 366 U. S. 259, 81 S. Ct. 1076, 6 L. ed. 2d 277 (1961); 17

Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148, 57 S. Ct. 696, 81 L. ed. 970 (1937); 19

State Tax Commission v. *Interstate Natural Gas Co.*, 284 U. S. 41, 52 S. Ct. 62, 76 L. ed. 156 (1931); 19

Thomas v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. ed. 782 (1908); 17

White River Lumber Co. v. *State of Arkansas*, 279 U. S. 692, 49 S. Ct. 457, 73 L. ed. 903 (1929); 17

Whitney v. *California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095 (1927). 17

STATUTES

	Page
Chapter 11, Article 13, West Virginia Code of 1931, as amended;	3, 4
Chapter 11, Article 13, Section 2, West Virginia Code of 1931, as amended;	3
Chapter 11, Article 13, Section 2d, West Virginia Code of 1931, as amended;	3, 4, 6, 10, 12, 14
15 USCA, Section 717(b);	19
15 USCA, Sections 717 through 717w;	8, 18
28 USCA, Section 1257(2);	10
28 USCA, Section 2103.	11

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article I, Section 8 (the Commerce Clause).	11, 13, 14

OTHER AUTHORITIES

Rule VI, Rules of the Supreme Court of Appeals of West Virginia.	16

IN THE

Supreme Court of the United States

October Term, 1969

No. 617

UNITED FUEL GAS COMPANY,
a corporation,
Appellant,

vs.

CHARLES H. HADEN II,
Tax Commissioner of West Virginia,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee respectfully moves that the Court dismiss the appellant's appeal herein or, in the alternative, to affirm the final judgment of the Supreme Court of Appeals of West

Virginia rendered in this cause on the following grounds:

(1) This case is not within the appeal jurisdiction of this Court.

(2) The Federal question which the appellant seeks to have reviewed was neither timely nor properly raised by appellant nor expressly passed on by the Courts below.

(3) The decision of the Supreme Court of Appeals of West Virginia is clearly correct and no substantial Federal question is presented in this appeal.

OPINIONS BELOW

The majority opinion of the Supreme Court of Appeals of West Virginia, written for the Court by Haymond, Judge, and the concurring opinion, written for the majority of the Court by Calhoun, Judge, are printed in 167 S. E. 2d, the opinion by Judge Haymond at pages 890 to 920, and the opinion by Judge Calhoun at pages 920 to 925.

RECORD REFERENCES

References herein to the record will be made in the following manner: references to the printed record will be indicated by the capital letter R followed by the page number or numbers, as (R. ....); references to Stipulation Exhibits 1 through 131 will be made by X plus the identifying number, as (X. ....); references to the Stipulation Map Exhibits will be made by MX plus the identifying number, as (MX. ....);

documents which became of record subsequent to submission of the case to the Supreme Court of Appeals of West Virginia are cited by reference to the typescript record, as (TR. ....).

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

THE STATUTE

Reference to West Virginia statutes as the same are embodied in the West Virginia Code of 1931, as amended, will be made herein as Code Chapter ....., Article ....., Section .....

Code Chapter 11, Article 13, is the Business and Occupation Tax Statute of the State, Section 2 whereof imposes an annual privilege tax against values accruing or gross income derived from business activities conducted within the State. Separate sections of Code Chapter 11, Article 13, classify the various kinds of business activity for tax purposes and establish the rate of tax to be applied to value accruing or gross receipts derived from a particular business.

The statute of the State of West Virginia directly involved in this appeal is one of the sections of the Business and Occupation Tax law, to-wit Code Chapter 11, Article 13, Section 2d. The amendments made to this section by Chapter 167, Acts of the Legislature of 1959, are of no significance for purposes of this appeal.

Code Chapter 11, Article 13, Section 2d, originally enacted by Chapter 86, Acts of the West Virginia Legislature of 1935, and subsequently amended by Chapter 165, Acts of 1955, and by Chapter 167, Acts of 1959, none of which amendments are relevant to this appeal, provides in pertinent part:

> "Upon any person engaging or continuing within this state in any public service or utility business * * *, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: * * * natural gas companies, three and nine-tenths per cent on the gross income * * *. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

B.

THE PROCEEDINGS BELOW

This case originated in an administrative decision or ruling by the Tax Commissioner of West Virginia which held the appellant herein, United Fuel Gas Company, liable to the State for unpaid Business and Occupation Tax and penalty under several sections of Code Chapter 11, Article 13, on account of appellant's business activities conducted within the State.

The appellant appealed the Tax Commissioner's administrative determination to the Circuit Court of Kanawha County, West Virginia, which appeal resulted in the development by the parties of fourteen (14) separate Agreed Issues of law for submission to the Court, embodied, numbered 1 through 14, respectively, in a document entitled "Stipulation Submitting Agreed Issues and Admitting Facts But Reserving Right to Object to Relevancy and Materiality." (R. 76.)

The Agreed Issues were resolved by the Circuit Court by its order of the 21st day of April, 1967, (R. 207 through 214), the reasons therefor being set forth in its Memorandum of Opinion bearing date the 24th day of January, 1967 (R. 215 through 262). Some of the Agreed Issues were decided for the appellant and against the Tax Commissioner while others were decided for the Tax Commissioner and against the appellant.

The Tax Commissioner appealed the decision of the Circuit Court with respect to Agreed Issues Nos. 1, 10, 12 and 13, decided against him, to the Supreme Court of Appeals of West Virginia, the highest Appellate Court of the State. The appellant cross-appealed with respect to certain of the Agreed Issues which had been decided by the Circuit Court against it.

The Supreme Court of Appeals, by the opinion of the majority of the four judges who considered the case (one judge dissenting), reversed the Circuit Court on all of the Agreed Issues decided by that Court against the Tax Commissioner, with the exception of Agreed Issues Nos. 12 and 13, which pertained to the

imposition of penalties, and affirmed the Circuit Court on all of the Agreed Issues presented by appellant on its cross-appeal which that Court had decided for the Tax Commissioner and against the appellant. See the opinion of Haymond, Judge, 167 S. E. 2d 890 to 920, and the concurring opinion of Calhoun, Judge, 167 S. E. 2d 920 to 925.

Although Judge Haymond was the author of the Court's opinion, he dissented therefrom to the extent that the opinion reversed the decision of the Circuit Court with respect to Agreed Issue No. 10. See 167 S. E. 2d 917.

The appellant petitioned the Supreme Court of Appeals of West Virginia for rehearing on that portion of its decision which reversed the ruling of the Circuit Court on Agreed Issue No. 10. This petition was denied by order of the Supreme Court of Appeals entered on the 24th day of June, 1969.

The appellant's appeal to this Court is confined to that portion of the decision of the West Virginia Supreme Court of Appeals which reversed the ruling of the Circuit Court on Agreed Issue No. 10. See Jurisdictional Statement, pp. 1, 2; Notice of Appeal, (TR. 1710).

Agreed Issue No. 10 pertains to taxation of appellant's gross income under Code Chapter 11, Article 13, Section 2d, derived from its sales, to three large industrial customers, of natural gas imported into West Virginia from other states. This gas, delivered in West Virginia by appellant from its transmission pipelines, was sold to these customers for use or consumption in their plant operations located within this State, *not for the purpose of resale by them.*

C.

THE NATURE OF APPELLANT'S BUSINESS ACTIVITIES

The business activities of the appellant in West Virginia with which this appeal is concerned involves the sale by appellant, under special contracts to the E. I. du Pont de Nemours and Company (du Pont), Elk Refining Company (Elk) and Kaiser Aluminum & Chemical Corporation (Kaiser), of natural gas which had been imported, prior to sale by appellant, into the State and delivered by appellant to said customers through its transmission pipelines. The du Pont, Elk and Kaiser companies are all located within appellant's West Virginia utility service territory. (MX. 153.) The gas was delivered to these customers on their premises in West Virginia through appellant's pipeline facilities and was there measured by metering devices owned by appellant.

Appellant is a corporation chartered under the laws of the State of West Virginia, originally incorporated as Kermit Gas Company on February 1, 1916. The name of appellant was changed to United Fuel Gas Company by amendment to its corporate charter on the 14th day of March, 1916. At all times relevant to this appeal and for many years prior thereto, appellant has been principally engaged in the production, purchase, transmission, distribution and sale of natural gas at both wholesale and retail and also engaged in the leasing of other tangible personalty. These activities have been carried on in West Virginia as well as in other states. In carrying out some of its corporate objects and purposes in West Virginia, appellant has always been a natural gas company en-

gaged in business in the State as a public utility regulated by the Public Service Commission of West Virginia. In carrying out other objects and purposes plaintiff has always been a natural gas company within the meaning of the Natural Gas Act, 15 USCA, Sections 717 through 717w, and, as to such business, been regulated since the year 1938 by the Federal Power Commission. (R. 89.) In addition to the three customers mentioned above, appellant's customers located in West Virginia are private persons as well as commercial and industrial concerns, all of whom consume the gas purchased from appellant, and also other gas companies purchasing natural gas from appellant for resale, both within and outside of West Virginia. Appellant's West Virginia utility service territory is approximated on (MX. 153) and had a 1961 population of 414,130 (R. 89).

Approximately 80% of appellant's property classified by the Public Service Commission of West Virginia as Gas Plant in Service was located in this State at year end 1961. The total depreciated original cost of appellant's Gas Plant in Service at year end 1961 was $165,786,314, the portion thereof located in West Virginia being valued at $132,892,508. This property included land, leaseholds, production gas wells, compressor stations, regulators, meters, pipelines of varying sizes and function, underground storage facilities, hydrocarbon products extraction plants, machinery, office furniture and equipment, and other property (X. 26, pp. 501-A through 504-A). In the year 1961 appellant's gross income from all sales of gas was $214,673,623, with gas sales of all kinds at West Virginia delivery points accounting for $109,465,235 thereof (R. 92).

By far the greater portion of the total volume of natural gas sold by appellant in West Virginia to its retail and wholesale customers is imported into this State from other states, principally Southwest gas produced in Texas and Louisiana and, to a much lesser extent, Appalachian gas produced in Kentucky and Virginia (X. 2). At all times relevant to this appeal, the Southwest gas was acquired by appellant in two ways, to-wit: (1) the purchase by appellant of Southwest gas for resale from Tennessee Gas Transmission Company, which company acquired gas from fields located in Texas and Louisiana and transported such gas through pipelines, in continuous streams to the points of sale and delivery to appellant in West Virginia and Kentucky; and (2) the purchase by appellant of natural gas for resale from operators of wells located in southern Louisiana, which volumes were transported for appellant in continuous streams to delivery points in Kentucky through pipelines owned and operated by Columbia Gulf Transmission Company (R. 95). That portion of the Southwest gas involved in this appeal, which appellant received in Kentucky, was transported by appellant by means of its own pipelines into West Virginia (Delivery Point 2, MX. 134, MX. 135). An overall view of appellant's West Virginia facilities as of December 31, 1961, is presented on (MX. 132) (R. 94).

Gas from all of the sources above-described makes up the common supply of gas, including those portions injected into and withdrawn from underground storage in West Virginia with which appellant served all of its West Virginia customers, both retail and wholesale, through a completely integrated system of pipelines and other facilities. These facilities are all equally

available to serve all of appellant's West Virginia customers without distinction as to customer or designation or classification of facility (R. 96).

The operational details of the gas deliveries to the three industrial customers with which this appeal is concerned are delineated on the Stipulation Map Exhibits as follows: du Pont (MX. 134, MX. 154, MX. 135); Elk (MX. 134, MX. 135, MX. 155, MX. 156); Kaiser (MX. 134, MX. 135, MX. 157).

II

ARGUMENT

1.

THIS CASE IS NOT WITHIN THE APPEAL JURISDICTION OF THIS COURT.

This is an attempted appeal brought under 28 USCA §1257(2) from a decision of the Supreme Court of Appeals of the State of West Virginia upholding a Business and Occupation Tax Assessment against the appellant, made under the provisions of Code Chapter 11, Article 13, Section 2d, on the ground that the assessment infringes upon appellant's Federal rights, privileges or immunities. The appellate jurisdiction of this Court does not extend to an action of this nature. *Charleston Federal Savings & Loan Association, et als.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. ed. 857 (1945); *Rohr Aircraft Corp.* v. *County of San Diego*, 362 U. S. 628, 80 S. Ct. 1050, 4 L. ed. 2d 1002, (1960). Furthermore, the appellant did not draw into question the validity of the statute of the State of West Virginia on which the tax assessment was based on the

ground of its being repugnant to the Constitution, treaties or laws of the United States in the Courts below, and consequently no appeal will lie. *Anonymous Nos. 6 and 7* v. *Baker*, 360 U. S. 287, 79 S. Ct. 1157, 3 L. ed. 2d 1234 (1959).

The decision below is reviewable, if at all, by writ of certiorari under 28 USCA § 2103. Accordingly, the appeal should be dismissed and, treating the papers as an application for a writ of certiorari, the writ should be denied.

2.

THE FEDERAL QUESTION WHICH THE APPELLANT SEEKS TO HAVE REVIEWED WAS NEITHER TIMELY NOR PROPERLY RAISED BY APPELLANT, NOR EXPRESSLY PASSED ON BY THE COURTS BELOW.

Although the appellant sets forth two questions in the Jurisdictional Statement, pp. 3 and 4, as grounds for conferring jurisdiction upon this Court, these questions are, in reality, one question, i.e. whether or not the Commerce Clause of Article 1, Section 8 of the United States Constitution forbids the State of West Virginia from taxing the sale of natural gas by appellant to the du Pont, Elk and Kaiser companies under the facts of this case.

This question was not raised by appellant in the State Courts below wherein the validity of the state statute involved was never challenged. In those Courts the appellant did not assert Federal constitutional pro-

hibitions to defeat imposition of the tax, but relied instead upon specific language of the taxing statute:

> "* * *. The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. * * *."

See Code Chapter 11, Article 13, Section 2d.

In its appeal to the Circuit Court of Kanawha County from the administrative decision of the Tax Commissioner (R. 14 through 48), the appellant assigned as error the ruling of the Commissioner that appellant's sales of natural gas to du Pont, Elk and Kaiser were taxable as utility sales under Code Chapter 11, Article 13, Section 2d, in the following language at (R. 43):

> "ASSIGNED ERROR 9
>
> "United Fuel assigns as error the inclusion and assertion of taxability under Section 2d of the Tax Statute of any gross income from deliveries of gas in interstate commerce to special contract industrial customers directly from United Fuel's interstate transmission pipeline system, *on the ground that the plain language of Section 2d excludes such gross income from taxation thereunder by providing, 'The measure of this tax (of Section 2d) shall not include gross income derived from commerce between this state and other states of the United States.'*" (Emphasis supplied.)

This assigned error was formulated by the parties for decision by the Circuit Court into the Agreed Issue

No. 10 (R. 85) with which this appeal is concerned. Agreed Issue No. 10 is couched in the following language:

> "AGREED ISSUE NO. 10
>
> "Re Special Industrial Contract Sales of Gas
>
> "Does Tax Section 2d, in providing inter esse that 'The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States.', thereby exclude from taxation under any Tax Section of the statute United Fuel's gross income from sale of gas under special industrial contracts directly from United Fuel's transmission pipelines to—
>
> "(a) E. I. du Pont de Nemours and Company,
>
> "(b) Elk Refining Company, and
>
> "(c) Kaiser Aluminum & Chemical Corporation
>
> "—in view of the particular facts, including the role of underground storage, involved in the sales and deliveries to each?" (Emphasis supplied.)

The Circuit Court in rendering its opinion with respect to Agreed Issue No. 10 (R. 250 through 255) understood that appellant was relying upon the exclusionary language of the taxing statute itself, rather than upon the Commerce Clause of Article I, Section 8 of the United States Constitution:

> "The primary contention of the plaintiff is that the exclusionary provision of the statute does not merely limit the application of the tax of Section 2d to sales which could be taxed without

impinging upon the Commerce Clause of the Constitution, but that all sales in interstate commerce are *thereby* excluded. The threshold question, therefore, is whether or not the sales involved in Agreed Issue No. 10 were in fact sales in interstate commerce." (Emphasis supplied.)

(R. 251.)

"Thus, the determinative question upon Agreed Issue No. 10 is whether such sales in interstate commerce come within the exclusion of Section 2d, which provides that the measure of the tax 'shall not include gross income derived from commerce between this state and other states of the United States.'" (Emphasis supplied.)

(R. 252.)

The appellant made no contention in the Supreme Court of Appeals of West Virginia that imposition of the tax under Code Chapter 11, Article 13, Section 2d was violative of Article I, Section 8 of the Commerce Clause of the United States Constitution. In that Court, as in the Circuit Court, the question presented by Agreed Issue No. 10 was the legislative intent to be deduced from the exclusionary language of Code Chapter 11, Article 13, Section 2d. See the opinion of Haymond, Judge, 167 S. E. 2d 890 to 920, at page 917:

"* * * The question presented by that issue [Agreed Issue No. 10] and here under consideration is not the validity of a state tax on interstate commerce in the absence of an exclusionary state statute which exempts such commerce from

> taxation but the validity of a tax on interstate commerce under a taxing statute of this State which provides that the measure of the tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. To say that the tax in question is valid because it does not burden but is merely incidental to interstate commerce is to ignore and not determine the question presented by Issue No. 10 which, of course, is whether, if the transportation under the cited cases is taxable interstate commerce, the income derived from such commerce is exempt from taxation by the exclusionary provision of Section 2d of the statute of this State. * * *" (Bracketed material supplied.)

As a matter of fact, appellant vigorously contended in the West Virginia Supreme Court of Appeals that no Federal Constitutional question was involved respecting the applicability of the taxing statute to its sales of natural gas to the three industrial customers concerned. See the opinion of Calhoun, Judge, 167 S. E. 2d 920 to 925, at pages 920, 921:

> "By the brief filed in behalf of United Fuel Gas Company (which hereafter in this opinion may be referred to as United Fuel) and by the amici curiae brief, as well as by oral argument of counsel by whom such briefs were filed, it has been vigorously urged that the stipulated issue in question is not concerned with the question whether the tax involves the Commerce Clause of Article I, Section 8 of the Constitution of the United States. Indeed, counsel, by brief and oral argument, have displayed a degree of impatience with the action of counsel for the defendant [Tax Commissioner] in asserting that imposition of

the tax here in question is not in violation of the Commerce Clause.

"The Court's opinion makes clear that Agreed Issue No. 10, does not involve the constitutional question, but that it involves only the validity of the tax when considered in relation to the provisions of Code, 1931, 11-13-2d, as amended, a statute which provides for payment of a tax, commonly referred to as a Business and Occupation Tax, 'Upon any person engaging or continuing *within this State* in any public service or utility business, * * *.' (Italics supplied.) The language relied upon by United Fuel is a sentence included in the statute which, so far as pertinent, is as follows: 'The measure of this tax shall not include *gross income derived from commerce* between this State and other states of the United States * * *.' (Italics supplied.)

"* * *. Nevertheless, the counsel for the taxpayers earnestly urge that the tax is in contravention of the statutory provision and yet strenuously insist that, in considering the validity of the tax, the Commerce Clause is not material in any sense or degree." (Bracketed material supplied.)

* * *

"* * * this issue does not involve a constitutional question, but rather the application and effect of the clear language of the statute."

Rule VI of the Rules of the Supreme Court of Appeals of West Virginia provides that no alleged error or point not set forth in the brief shall be raised thereafter either by reply brief or on oral or printed argument or on petition for rehearing. In its petition for rehearing (TR. 1673) from the judgment of the Su-

preme Court of Appeals of West Virginia appellant did not attack the constitutional validity of the taxing statute, but had such attempt been made, it would have been barred by the rule of the Court.

The initial challenge which appellant made to the constitutional validity of the taxing statute was in the Notice of Appeal to the Supreme Court of the United States. (TR. 1710.)

This Court has consistently ruled that before its jurisdiction can be invoked on appeal or certiorari from a state court it must appear that the Federal question involved was raised in the State Court at the proper time. The Federal question may not be raised for the first time in the notice of appeal to this court or in the Jurisdictional Statement. *Ker* v. *California*, 374 U. S. 23, 44, 83 S. Ct. 1623, 10 L. ed. 2d 726, 744 (1963); *Raley* v. *Ohio*, 360 U. S. 423, 434, 435, 79 S. Ct. 1257, 3 L. ed. 2d 1344, 1353, 1354 (1959); *White River Lumber Co.* v. *State of Arkansas*, 279 U. S. 692, 700, 49 S. Ct. 457, 73 L. ed. 903, 911 (1929); *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 40 S. Ct. 330, 64 L. ed. 601 (1920); *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095 (1927); *Thomas* v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. ed. 782 (1908); *Slagle* v. *State of Ohio*, 366 U. S. 259, 81 S. Ct. 1076, 6 L. ed. 2d 277 (1961); *Charleston Federal Savings & Loan Association, et als.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. ed. 857 (1945).

3.

THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

The decisions of this Court and the Natural Gas Act, 15 USCA, Sections 717 through 717w, enacted pursuant to those decisions, demonstrate that the State of West Virginia is not prohibited by the Commerce Clause of the United States Constitution from exercising the functions of taxation and regulation upon the sale of natural gas by appellant, a resident public utility, delivered by way of appellant's transmission pipelines, to resident industrial customers located within its utility service territory in this State, who consume such gas in their businesses and do not purchase the same for resale, which gas, prior to such sale and delivery by appellant was imported into West Virginia from other states.

Prior to enactment of the Natural Gas Act in 1938 this Court in a series of decisions had dealt with various situations arising from state efforts to regulate or tax the sale of imported natural gas. See *Illinois Natural Gas Co.* v. *Central Illinois Public Service Company*, 314 U. S. 498, 62 S. Ct. 384, 86 L. ed. 371 (1942); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 68 S. Ct. 190, 92 L. ed. 128 (1947). These decisions established the Commerce Clause standard against which the constitutionality of a state tax on this kind of transaction can be tested. The standard is quite simple, i. e., the sale of imported gas which has moved in interstate commerce

to a *consumer* is local business separated from the national commerce and, as such, fully amenable to state taxation, whereas taxation of the sale of such gas to a distributor for resale in the taxing state or elsewhere is forbidden as being beyond the reach of state power. *Public Utilities Commission for the State of Kansas* v. *Landon*, 249 U. S. 236, 39 S. Ct. 268, 63 L. ed. 577 (1919); *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 40 S. Ct. 279, 64 L. ed. 434 (1920); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, 68 L. ed. 1027 (1924); *Public Utilities Com.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 S. Ct. 294, 71 L. ed. 549 (1926); *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, 51 S. Ct. 499, 75 L. ed. 1171 (1931); *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 52 S. Ct. 62, 76 L. ed. 156, (1931); *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, 57 S. Ct. 696, 81 L. ed. 970 (1937).

The principle enunciated by the cases cited above was carried over into the Natural Gas Act. Subsection (b) of Section 717 which determines the Act's coverage, provides that it shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana, supra.* The charge or rate which appellant makes to the three subject industrial customers for the gas sold to them is fixed by contract between the parties, not by the Federal Power Commission.

Thus, the conclusion reached by the majority of the West Virginia Supreme Court of Appeals that appellant's gas sales to the du Pont, Elk and Kaiser companies, for consumptive use by those customers, and not for resale, are merely a species of its local business divorced from the national commerce, is in complete harmony with the decisions of the United States Supreme Court, extending in a uniform line of adjudications on this subject from the year 1919 to the present. *El Paso Electric Co.* v. *Calvert, et al.*, 385 S. W. 2d 542 (Tex. 1965) appeal dismissed per curiam, October 11, 1965, for want of substantial Federal question, 382 U. S. 18, 86 S. Ct. 89, 15 L. ed. 2d 15. For the reason that these gas sales are local business of appellant in West Virginia, they are subject to the Business and Occupation Tax to the same extent as any other local business activity carried on within the State. The circumstances of this case plainly present no Commerce Clause question and, accordingly, no need for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed, or the decision of the Supreme Court of Appeals of West Virginia be affirmed.

Respectfully submitted,

WILLIAM F. CARROLL
Assistant Attorney General
State of West Virginia
Counsel for Appellee

Of Counsel
CHAUNCEY H. BROWNING, JR.
Attorney General
State of West Virginia

SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED FUEL GAS CO. *v.* HADEN, TAX COMMISSIONER

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 617. Decided December 8, 1969

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.